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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF PAGEDALE, MISSOURI,
Petitioner,

vs.

ELLENA HARRIS and MICHAEL HAYLES,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a municipal custom, itself neither unconstitutional nor deliberate, may be established under 42 U.S.C. §1983 by a nonpolicy-making police officer employee, without any admissible evidence of actual prior misconduct by respondent police officer Hayles or by any other police officer of petitioner City?

II. Whether an alleged municipal custom, itself neither unconstitutional nor deliberate, of failing to investigate and to act upon prior purported, but unproven, complaints of misconduct by petitioner City's police officers can establish municipal liability under 42 U.S.C. §1983, without any admissible evidence of actual complaints lodged and neither investigated nor appropriate action taken by petitioner City when warranted?

III. Whether repeated hearsay reports of prior misconduct by respondent police officer Hayles and by other police officers of petitioner City, admitted solely as evidence of alleged complaints having been made but not admitted as evidence of actual prior misconduct, so prejudiced petitioner City as to deny it a fair trial?

IV. Whether an alleged municipal custom, itself neither unconstitutional nor deliberate, of failing to investigate and to act upon prior purported, but unproven, complaints of misconduct by petitioner City's police officers, can be deemed the moving force, in a "but-for" sense, of respondent police officer Hayles's rape and sodomy of respondent Harris under 42 U.S.C. §1983?

V. Whether the action or inaction of a single member of a duly elected legislative body, who has not been delegated any specific or individual authority by that body, can establish a municipal custom under 42 U.S.C. §1983?

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Volume 1 - Proceedings of May 20, 1986

Volume 2 - Proceedings of May 21, 1986

Volume 3 - Proceedings of May 22, 1986

Volume 4 - Proceedings of May 23, 1986

Volume 5 - Continued Proceedings of May 23, 1986

Volume 6 - Proceedings of May 27, 1986

Volume 7 - Proceedings of May 28, 1986

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On Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION AND JUDGMENT BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 821 F.2d 499 (8th Cir. 1987) and is reproduced in the Appendix to this Petition for Writ of Certiorari at A1.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, Respondent Harris brought this suit in the United States District Court for the Eastern Division of the Eastern District of Missouri. A trial resulted in a jury verdict on May 29, 1986, for Respondent Harris against Petitioner City and against Respondent Hayles. Judgment for Respondent Harris was affirmed by the United

States Court of Appeals for the Eighth Circuit on June 17, 1987 (reproduced in Appendix at A1 - A17. Petitioner's motion for rehearing and/or rehearing en banc was filed on June 30, 1987 (reproduced in Appendix at A18 - A23), and the same was denied on July 28, 1987 (reproduced in Appendix at A24).

Jurisdiction of this Honorable Court to review the judgment of the Eighth Circuit is invoked by Petitioner City under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE

Fourteenth Amendment to the United States Constitution, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This was a civil rights action brought under 42 U.S.C. §1983 by Respondent Ellena Harris (hereafter "Harris") against Petitioner City of Pagedale, Missouri (hereafter "City") and one of its police officers, Respondent Michael Hayles (hereafter "Hayles"). Harris alleged that Hayles raped and sodomized her while in the course and scope of his employment as City's police officer and as a direct result of City's custom of failing to investigate and to act upon complaints of misconduct by its police officers.

At trial, there existed not one whit of evidence admitted for the purpose of establishing that prior to January 29, 1985 (the date of the admitted rape and sodomy of Harris by Hayles), that any City police officer had "sexually and [or] physically assaulted" any person "in a punitive manner which violated the Fourteenth Amendment to the Constitution," which assault was known by any City official. (Special Interrogatories No. 1, Apx. at A26).

At trial, there existed not one whit of evidence admitted for the purpose of establishing that prior to January 29, 1985, any person had ever filed a written complaint with or to the City's police department, which had not been thoroughly and fairly investigated and appropriate action taken, if warranted.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

This Honorable Court should grant this Petition for Writ of Certiorari for the following special and important reasons:

1. The decision affirmed below does total injustice and is contrary to this Honorable Court's holding in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) and its progeny through *Pembaur v. City of Cincinnati*, 475 U.S. ____, 89 L.Ed.2d 452 (1986).

2. The decision affirmed below will open wide governmental treasuries to recoveries under 42 U.S.C. §1983 for a single incident of misconduct by a nonpolicy-making police officer, when there exists no admissible evidence, but only hearsay reports admitted for other reasons, of prior misconduct by such officer or similarly situated officers.

3. The decision affirmed below will open wide governmental treasuries to recoveries under 42 U.S.C. §1983 by permitting an act by a single member of a legislative body, who has not been delegated specific or individual authority by that body, to constitute a municipal custom.

4. The decision affirmed below is contrary to decisions by all other circuits, which require proof of actual prior misconduct to establish a custom under 42 U.S.C. §1983, when suit is based on a single incident by a nonpolicy-making police officer. Exactly on point as to both facts and law is *Carter v. District of Columbia,* 795 F.2d 116 (D.C.C. 1986) (Opinion of Judges Ginsburg and Bork). See: *City of Oklahoma City v. Tuttle,* 471 U.S. 808 (1985).

5. The decision affirmed below permits a custom, itself not unconstitutional, to constitute the necessary moving force, in other than a "but-for" sense, for a single incident by a nonpolicy-making police officer under 42 U.S.C. §1983, an important question expressly left unanswered in *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 824 n.7.

ARGUMENT

I

A Municipal Custom, Itself Neither Unconstitutional Nor Deliberate, May Not Be Established Under 42 U.S.C. §1983 By A Nonpolicy-Making Police Officer Employee, Without Any Admissible Evidence Of Actual Prior Misconduct By Respondent Police Officer Or By Any Other Police Officer Of Petitioner City.

At trial, all parties agreed that Harris's claim against the City was in the nature of a "custom" (as opposed to a "policy"), as established in *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978), and the jury was instructed accordingly. (Apx. at A25).

> 'Although not authorized by written law, such practices of . . . officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.'

Monell, supra, 436 U.S. at 691, quoting from *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 167-68 (1970). In examining the law of municipal custom under §1983, in light of the particular evidence in this case, it is important to bear in mind that "custom" was defined for the jury as:

> . . . a course of conduct of deliberate indifference by city officials and consisting of persistent and widespread practices that are permanent and well settled or are deeply embedded traditional ways of carrying out policies, so as to have the force of law, although not formally adopted or announced by the municipality.

(Instruction No. 9, Apx. at A25).

In this case, there existed not one whit of evidence admitted for the purpose of proving that prior to January 29, 1985, any City police officer had "sexually and[/or] physically assaulted"

any person "in a punitive manner which violated the Fourteenth Amendment to the Constitution," which assault was known by any City official. (Special Interrogatories No. 1, Apx. at A26).

The patchwork of hearsay, innuendoes, and gossip presented by Harris did not begin to establish even the semblance of a City custom, which might have caused (much less contributed) to her unfortunate sexual assault by Hayles on January 29, 1985.

There was evidence admitted of only a single incident of related misconduct by Hayles, that against Tina Forbes which occurred several weeks before the sexual assault of Harris by Hayles. (T.3/190). This incident is of no legal consequence to any legal liability of the City, inasmuch as there was no evidence offered that it was ever brought to the attention of any City official. Other than Ms. Forbes and Hayles, only Ms. Forbes's mother had been told of the allegations. (T.3/200). The jury was expressly instructed by the Trial Court that this evidence was "not [to be] considered as evidence of any custom, policy or practice by the City." (T.3/202-03). Nevertheless, the Appellate Court opinion recited in detail this testimony (Apx. at A7) and relied upon it (Apx. at A11).

Harris and the Appellate Court both appear to have relied primarily on the "Prothro" allegation. Yet, there was no evidence admitted for the purpose of proving that any misconduct by Hayles against Michelle Prothro had ever occurred. The Trial Court only permitted double-hearsay evidence that an allegation of such misconduct had been made to City officials, and forbid such testimony to be considered "as evidence of the truth of what was complained about" (T.3/58-59). For the former purpose only, Mr. Searcy was permitted to testify as to what Michelle Prothro's mother had said Michelle had told her. (T.3/62).

There was uncontradicted evidence that City's Police Chief conducted an investigation of the matter. The Chief interviewed the only two witnesses to the matter, City's police officers

Jones and Helms (T.3/87, 7/73), both of whom testified at trial that they observed no serious misconduct of any kind. (T.3/76-77, 7/74-75). There was no evidence that the Chief's investigation was not thorough nor complete. Both officers Jones and Helms also testified before the City's Board of Alderpersons about their knowledge of the Prothro allegation. (T.6/86).

On its own initiative and because of the seriousness of the allegation, the City Board of Alderpersons unanimously requested an independent investigation by the St. Louis County Police Department. (T.2/202, 3/16, 3/160, 6/68). The Appellate Court incorrectly stated that Ms. Prothro "filed a complaint against officer Hayles with the St. Louis County Police Department." (Apx. A5). This investigation concluded that the Prothro allegations against Hayles were unfounded. (T.3/17, 3/143/ 6/68). The complaining witness and her mother refused to be interviewed or to cooperate in the investigation by St. Louis County. (T.4/63-64).

On the basis of the City's own investigations by its Chief and by its Board and that of St. Louis County, Hayles was not disciplined for any sexual assault of Michelle Prothro. Hayles was given a two or three day suspension by the City for having interviewed Michelle Prothro, without the presence of an available female police officer. (T.3/35, 6/231). Contrary to the trial record, the Appellate Court found it "unclear ... whether this suspension was in fact ever ordered." (Apx. A4 n.4). To suggest that the City erred in not discharging Hayles on the basis of hearsay allegations, when three separate investigations did not substantiate any of the allegations, defies logic. Such discharge would have subjected the City to suit by Hayles.

The Appellate Court incorrectly recited that both Mayor M. Hall and Alderperson L. Hall "had spoken personally with Michelle Prothro." (Apx. at A5). Yet, the transcript clearly reflects that Mayor M. Hall only heard of the purported inci-

dent third-hand from Alderperson L. Hall (T.6/183-84) and that Alderperson L. Hall heard of the purported incident second-hand from Ms. Prothro's brother. (T.2/201). Neither witness nor any City official ever spoke to Ms. Prothro. To understand the real miscarriage of *Monell* visited by this case, it is necessary to carefully and accurately peruse the transcript.

Numerous hearsay and rumored reports of prior misconduct were permitted by the Trial Court not as evidence of the misconduct itself, but solely as evidence of the report having reached City officials. For example, the Trial Court admitted for this limited purpose a hearsay report, based on an unsubstantiated newspaper article, of an alleged statutory rape by City police officer Ricky Collins, who was suspended by the City immediately upon his subsequent indictment. (T. 3/174).

There was also the hearsay video taped interrogation of Tammy Owens by the Northwoods, Missouri Police Department. The reluctance of former Alderperson Hall to bring to the City Board's attention the hearsay allegations on the Tammy Owens video tape cannot be criticized. She and former Mayor M. Hall had been expressly instructed by Northwoods Detective Sergeant Brady not to discuss the tape with anyone unless she had to, because it was part of an ongoing police investigation. (T.2/197-98). Regardless, the jury apparently did not believe that any failure by Alderperson L. Hall or by Mayor M. Hall to relay the contents of the tape to the Board was significant, since by its finding of "No" on Special Interrogatories No. 2 (Apx. A26), it refused to find City liability by any action of the Mayor (T.7/149); which could only have been premised on her viewing of the Owens video tape.

Each of the City officials called as witnesses by Harris, as well as the former City Attorney, called as a witness by City, testified that only the Board could hire, fire, or suspend police officers. Officers might be temporarily suspended by the Chief, but only until a Board meeting could be convened and the suspension ap-

proved or vacated by a majority vote of the Board. (T.3/5, 3/30-31, 3/119-21, 6/52-53, 6/142, 7/35-36, 7/68).

In regard to the rumors and allegations of prior police misconduct (of which not a single witness testified nor was any evidence admitted as to the truthfulness of any such rumors or allegations), the Trial Court was forced to give its cautionary instruction no less than 23 times. (T.2/211, 2/214, 3/25, 3/45, 3/59, 3/62, 3/116, 3/124-25, 3/137, 3/202-03, 4/61-62, 4/83, 6/62, 6/67, 6/77, 6/78, 6/124, 6/129, 6/131, 6/179, 6/190, 6/193, 6/200). This instruction to the jury required that a hearsay report of police misconduct could not be considered as evidence of the truth of such misconduct, but only as evidence that such allegation had been conveyed to some City official.

The Appellate Court Opinion repeatedly spoke of "evidence of prior incidents of police sexual misconduct" (Apx. at A3), "extensive evidence of prior incidents of sexual misconduct involving Officer Hayles" (Apx. at A3), "copious evidence of past misconduct" (Apx. at A10), a "known and continuing pattern of unconconstitutional police misconduct" (Apx. at A11), "a pattern of sexual misconduct by City police officers, especially Officer Hayles" (Apx. at A13), "many other sexual violations committed by Officer Hayles and by other City police officers" (Apx. at A17), and "persistent sexual misconduct by police officers" (Apx. at A17), all without a single reference to any evidence admitted at trial for the purpose of establishing the same; as opposed to having been admitted solely for the purpose of proving that the allegation had been made known to some City official.

Nor did the Appellate Court make a single reference to any evidence admitted at trial for the purpose of establishing that a valid complaint of police misconduct had ever been lodged with the City, though not investigated or appropriate disciplinary action taken, if warranted. The entire record is utterly devoid of evidence admitted for the purpose of establishing either of these two critical elements of Harris's case.

The Appellate Court relied almost exclusively upon its prior decision in *Herrera v. Valentine,* 653 F.2d 1220 (8th Cir. 1981); while ignoring that in *Herrera,* the plaintiff "introduced evidence that established the City's formal policy or custom of mistreating Indians generally, and Mr. and Ms. Yellow Bird specifically." 653 F.2d at 1223. The Appellate Court failed to distinguish between complaints of proven actual misconduct as in *Herrera,* and complaints of only hearsay but unproven misconduct as in the instant case. The Appellate Court concluded that the "Harris assault was similar to many other sexual violations committed by Officer Hayles and by other City police officers" (A17); despite the fact that the Trial Court did not permit any evidence to be admitted as to the truth of such occurrences. There has been a total distortion and gross anomaly between the evidence admitted at trial and the conclusions drawn from that evidence.

Nor was the City's police force undisciplined; Harris's own witness, former Alderperson J. Taylor testified that 10 to 15 officers had been suspended during his two year term. (T.3/122). Again, the Appellate Court has disregarded the record finding that on these 10 to 15 occasions "the matter did not come before the Board of Aldermen." (A14) Harris's witness, Mr. Taylor, testified directly to the contrary. (T.3/122-24).

This Honorable Court last year unequivocally ruled that negligence of a City may not serve as the underpinning of a §1983 action.

> We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property.

Daniels v. Williams, 474 U.S. ____, 88 L.Ed.2d 662, 666 (1986).

> Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property.

. . . .

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

Daniels, supra, 88 L.Ed.2d at 668.

> Where a government official's act causing injury to life, liberty or property is merely negligent, 'no procedure for compensation is *constitutionally* required.' *Parratt,* 451 U.S. at 548.

Daniels, supra, 88 L.Ed.2d at 669. Although the acts of Hayles were deliberate and gravely damaged Harris, Harris never proved Hayles's acts were sanctioned by the City or that any acts of the City were "*deliberate* decisions of government officials to deprive . . . [her] of life, liberty or property." *Daniels, supra,* 88 L.Ed.2d at 666. Harris further failed to show such acts led to or caused such result.

The legal liability of municipalities under claims brought pursuant to §1983 has been sharply defined and restricted in recent years. The basis of any such recovery must be consistent with this Honorable Court's benchmark holding in *Monell, supra.*

> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as a entity is responsible under §1983.

Monell, supra, 436 U.S. at 694.

This Honorable Court in *City of Oklahoma City v. Tuttle,* 471 U.S. 808 (1985), refined *Monell* as to isolated acts of government officials.

> [A] city [can]not be held liable under §1983 based upon theories akin to *respondeat superior* . . . only deprivations visited pursuant to municipal 'custom' or 'policy' [can] lead to municipal liability.

Id. at 818.

> [A] municipal corporation [can] be held liable only for constitutional violations resulting from the municipality's official policy.

Id. at 822.

. . . .

> *Proof of a single incident of unconstitutional activity is not sufficent to impose liability under* Monell, *unless proof that it was caused by an existing, unconstitutional municipal policy,* which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.

Id. at 823-24. (Emphasis supplied).

This Honorable Court in *Daniels, supra,* quoting with approval Justice Powell's concurrence in *Parratt v. Taylor,* 451 U.S. 527, 549 (1981), stated "*we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'*" *Daniels, supra,* at 667. (Emphasis supplied). Decided

the same day as *Daniels* was *Davidson v. Cannon,* 474 U.S. ____, 88 L.Ed.2d 677 (1986), in which it was stated:

> [T]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. *In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required.*
>
> . . . .
>
> The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.

Davidson, supra, 88 L.Ed.2d at 682-83. (Emphasis supplied).

Most recently, this Honorable Court in *Pembaur v. City of Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986), issued its latest discussion in this area. Setting forth a detailed analysis of *Monell, supra,* and its progeny, the High Court stated:

> Our analysis must begin with the proposition that 'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.' *Monell v. New York City Dept. of Social Services,* 436 U.S., at 691 . . .
>
> *Monell* is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under §1983 for deprivations of federal rights, overruling a contrary holding in *Monroe v. Pape,* 365 U.S. 167 (1961) . . . In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior* . . .
>
> The conclusion that tortious conduct, to be the basis for municipal liability under §1983, must be pursuant to a

> municipality's 'official policy' is contained in this discussion. The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that *municipal liability is limited to action for which the municipality is actually responsible. Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, *acts which the municipality has officially sanctioned and ordered.*
>
> . . . .
>
> [A] municipality may be liable under §1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy.

Pembaur, supra, 89 L.Ed.2d at 461-63. (Emphasis supplied).

The jury received no evidence admitted to establish any physical or sexual misconduct by any police officer of the City, including any such prior misconduct by Hayles which had come to the attention of the City.

Prior to the decision in this case, the Eighth Circuit, as all other Circuits, had clearly established the burden for "suit under §1983 for a continuing failure to remedy a known pattern of constitutionally offensive conduct by its subordinates." *Baker v. McCoy,* 739 F.2d 381 (8th Cir. 1984).

> In order to sustain such a claim, the plaintiff must show that the governmental body had notice of prior misbehavior, that it failed to act, with 'deliberate indifference' to further constitutional violations, and that such failure to act proximately caused the injury. . . . In the present case, however, *no evidence was offered of a pattern of similar incidents . . . thus, we must hold that [plaintiff]*

> *failed to make a submissible case* . . . and that the district court did not err in granting . . . a directed verdict.

Baker, supra, 739 F.2d at 384-85. (Emphasis supplied).

Similarly, in *Patzner v. Burkett,* 779 F.2d 1363 (8th Cir. 1985), the Eighth Circuit had previously held:

> [F]or a municipality to be held liable under §1983, a plaintiff must show that the action alleged to be unconstitutional . . . was invoked pursuant to a governmental custom . . . [which] was the 'moving force' behind the violation. . . . Moreover, *the plaintiff must show* not only that a . . . custom existed, and that it was causally related to the plaintiff's injury, but *that the policy itself was unconstitutional.*
>
> . . . .
>
> *[Plaintiff] argues that the requisite notice of prior misconduct may be inferred. . . . We cannot agree. [Plaintiff] failed to put forth any evidence suggesting that the arrest procedures . . . employed on [prior] occasions, or . . . use of physical means to effect them, were in any way improper.*
>
> . . . .
>
> We therefore affirm the district court's grant of summary judgment in favor of Stutsman County.

Patzner, supra, 779 F.2d at 1367. (Emphasis supplied).

Harris's total absence of any evidence admitted of prior misconduct by any City police officer known to the City, including Hayles, was expressly addressed in *Strauss v. City of Chicago,* 760 F.2d 765 (7th Cir. 1985). In *Strauss,* the Seventh Circuit affirmed the District Court's dismissal for failure to state a claim upon which relief could be granted. Defendant's motion to dismiss was granted solely on the basis of plaintiff's pleadings, despite the liberality granted to notice pleadings in

federal court. As here, Strauss sought to sue on the basis of a physical assault by a police officer and alleged a past practice by defendant of failing to conduct proper investigations of police officer misconduct. The Appellate Court held:

> A complaint that tracks *Monell's* requirement of official policy with bare allegations cannot stand when the policy identified is nothing more than acquiescence in prior misconduct. The absence of any facts at all to support plaintiff's claim renders the allegations mere legal conclusions of Section 1983 liability devoid of any well-pleaded facts.

Strauss, supra, 760 F.2d at 767.

> *. . . claims 'based on wholly conclusory allegations of a de facto municipal policy . . ., the existence of which is to be inferred not from something the municipality did but rather from its inaction, constitute one of the most prevalent forms of abuse in section 1983 actions' . . .*

Strauss, supra, 760 F.2d at 768. (Emphasis supplied).

> *At the very least Strauss 'would need to identify as well what it was that made those prior arrests . . . illegal and to show that a similar illegality was involved in his case.' Ekergren v. City of Chicago,* 538 F.Supp. 770, 773 (N.D.Ill. 1982).

Strauss, supra, 760 F.2d at 769. (Emphasis supplied). Certainly, the standard of evidence necessary for Harris to make a submissible case at trial is no less than that of surviving a motion to dismiss for failure to state a claim at the close of Harris's case (Tr. 6/241-42) or at the close of all the evidence (Tr. 7/78), both motions having been timely made here by City, or no less than that necessary to survive a motion to dismiss as in *Strauss.*

In a decision on all fours, legally and factually, the District of Columbia Circuit, speaking through Judges Ginsburg and Bork, stated:

> To succeed, a plaintiff must show a course deliberately pursued by the city, 'as opposed to an action taken unilaterally by a nonpolicy-making municipal employee,' ...
>
> ....
>
> Plaintiffs ... sought to demonstrate: (1) misconduct similar to the events in suit so widespread that it would not have persisted without the city's tacit approval; ... and (3) the inadequate response accorded to complaints of police misconduct, which signaled to police officers that their misbehavior would not be treated by the city as a matter of large concern.

Carter v. District of Columbia, 795 F.2d 116, 122 (D.C.C. 1986).

In discussing evidence of hearsay reports of misconduct (admitted for purposes other than proving such acts had occurred), the Appellate Court stated:

> Plaintiffs urge us to include and consider under this heading, *inter alia,* bare complaints, pleadings, and press clippings, unsubstantiated by testimony, concerning alleged incidents of the use of excessive force by police officers. As the district court recognized, these hearsay items could show no more than notice to the city that allegations had been made. The items were admitted for that limited purposes, and 'not for the purpose of establishing the truth of those [allegations.]' Transcript (Tr.) 997; *see also* Tr. 320B-320C, 425-26, 703-04. We therefore cull out such items as failing to show actual, as distinguished from merely alleged, occurrences.

Carter, supra, 795 F.2d at 123.

In *Carter, supra* (as opposed to the present case), plaintiffs did produce some evidence of prior beatings, deaths, and officer reprimands. Nevertheless, the Appellate Court observed:

> This catalog of disquieting events is not sufficient to demonstrate a pervasive pattern of police officer indulgence in the use of excessive force, persisting in the District because of the MPD's tacit approval. We can glean nothing from the seven deaths acknowledged by Police Chief Turner, because plaintiffs presented no detail at all on these incidents. The remaining occurrences are scattered and do not coalesce into a discernible 'policy.' If the evidence plaintiffs presented here were adequate to make out a §1983 case, then practically every large metropolitan police force, it would seem, could be targeted for such liability.

Ibid. The perceptive analysis by the District of Columbia Circuit in *Carter,* separating the evidentiary wheat from the chaff, is equally applicable here.

II

An Alleged Municipal Custom, Itself Neither Unconstitutional Nor Deliberate, Of Failing To Investigate And To Act Upon Prior Purported, But Unproven, Complaints Of Misconduct By Petitioner City's Police Officers Cannot Establish Municipal Liability Under 42 U.S.C. §1983, Without Any Admissible Evidence Of Actual Complaints Lodged, And Neither Investigated Or Appropriate Action Taken By Petitioner City When Warranted.

In this case, there existed not one whit of evidence that prior to January 29, 1985, any person had ever filed a written complaint with or to the City's police department which had not been thoroughly and fairly investigated and appropriate action taken, if warranted.

Every City official, whether called by Harris or by City, testified that the unwaivering City policy was to refer verbal citizen complaints against police officers to the police department for the filing of a formal written complaint. (T.3/31,

3/138, 6/143, 6/227, 7/22). Harris presented no evidence that even a single complaint was factually supported, or was properly lodged, or was not thoroughly investigated, or that appropriate and warranted disciplinary action was not taken.

The lengthy discussion under Point I, *supra,* as to the total absence of evidence of prior police misconduct is equally applicable here as to the total absence of evidence of alleged mishandled or ignored complaints of misconduct.

The District of Columbia Circuit addressed this very issue in *Carter, supra.*

> 3. **Inadequate attention to complaints**
>
> Through statistical proof and evidence of specific instances, plaintiffs attempted to show that complaints of police brutality would languish at the MPD, so that officers could act in derogation of constitutional rights without fear of sanction. Plaintiffs' statistics, however, were too general to prove any pattern or policy, and their specific instances were too scattered and lacking in detail to build a case.

Carter, supra, 795 F.2d at 124.

> Egregious instances of misconduct, relatively few in number but following a common design, may support an inference that the instances would not occur but for municipal tolerance of the practice in question. We can say with assurance, however, that the assorted actual instances of misconduct demonstrated in this case do not line up to compose a common or widespread pattern of police misbehavior adequate to establish §1983 municipal liability.

Ibid.

During the period from January 1, 1980, to date of trial (May 29, 1985), Harris offered into evidence not a single incident of relevant City police misconduct or of lax complaint procedure,

although a total of over 23,000 arrests were effected by the City's police department during that period. (T.6/148-49).

III

Repeated Hearsay Reports Of Prior Misconduct By Respondent Hayles And By Other Police Officers Of Petitioner City, Admitted Solely As Evidence Of Alleged Complaints Having Been Made But Not Admitted As Evidence Of Actual Prior Misconduct, So Prejudiced Petitioner City As To Deny It A Fair Trial.

The Trial Court consistently allowed hearsay, double hearsay and triple hearsay accounts of prior police misconduct, solely for the purpose of proving that such reports came to the knowledge of City officials; while expressly excluding such evidence as inadmissible for the purpose of proving the truth of such incidents. These hearsay recitations included in all aspects every incident mentioned by the Eighth Circuit, including the Tammy Owens video and the Michelle Prothro allegation. The Trial Court was required to give its cautionary instruction no less than on 23 separate occasions. (See page 9, *supra*).

The District of Columbia Circuit in *Carter, supra,* recognized it is not possible to unring the bell.

> Following the reading of account after account of alleged misconduct by the defendants, there was a significant risk that the jury would conclude that the evidence established the bad character of the defendants and that the defendants were likely to have acted in the same way on the night in question. Use of the 'other acts' evidence for this purpose is, of course, precisely what Rule 404(b) proscribes.

Carter, supra, 795 F.2d at 131.

> In this case, none of these factors weigh in favor of a finding of harmless error. First, considering the evidence only

for the purposes for which it was properly admitted, the case can be characterized as close. The evidence on both sides consisted almost entirely of eyewitness testimony by the parties involved. As pointed out earlier, the parties' accounts of what happened differ substantially in many material respects. *See supra* at 118-20. The testimony was such that the jury could have found for either side. In this circumstance, we cannot say with confidence that the extensive evidence admitted tending to show the bad character of members of the NTF in general, and the defendants in particular, did not 'substantially sway[]' the jury's verdict. *Kotteakos v. United States,* 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946).

Second, whether the defendants engaged in misconduct with respect to their arrest of the plaintiffs was, of course, the overarching question in this case. Admission of the 'allegations' evidence was, therefore, very likely to affect the jury's consideration of virtually all issues in the case.

Third, although the trial judge gave limiting instructions as the evidence was admitted, these instructions could not mitigate the effects of the error. The only 'evidence' probative of any issue properly in the case was whether Chief Turner and Lieutenant Jones failed to properly supervise and discipline members of the NTF. Determining their awareness of allegations of misconduct by such members was part of this evidence. The judge's limiting instructions went only to the proper uses of *this* evidence. As discussed, the specific contents of the newspaper articles, citizen complaints, and personnel files were not admissible for *any* purpose. Thus, the limiting instructions could not cure the errors committed with respect to the manner in which the evidence was admitted.

Carter, supra, 795 F.2d at 132. The Appellate Court's language in *Carter* is exactly on point and determinative here,

where the "overarching question" in the case was the City's custom of investigating complaints and the "[a]dmission of the 'allegations' evidence was . . . likely to affect the jury's consideration."

IV

An Alleged Municipal Custom, Itself Neither Unconstitutional Nor Deliberate, Of Failing To Investigate And To Act Upon Prior Purported, But Unproven, Complaints Of Misconduct By Petitioner City's Police Officers, Cannot Be Deemed The Moving Force, In A "But For" Sense, Of Respondent Police Officer Hayles's Rape And Sodomy Of Respondent Harris Under 42 U.S.C. §1983.

In *Tuttle, supra,* this Honorable Court stated:

> We express no opinion on whether a policy that itself is not unconstitutional, ... can ever meet the 'policy' requirement of *Monell.* In addition, even assuming that such a 'policy' would suffice, it is open to question whether a policymaker's 'gross negligence' ... could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required.

Tuttle, supra, 471 U.S. at 824 n.7.

As originally enunciated in *Monell, supra,* the official custom necessary to establish municipal culpability must be "the moving force of the constitutional violation." 436 U.S. at 694. Under no fair and reasonable consideration of the facts in this case did any action or inaction of the City constitute the moving force of Harris's sexual assault by Hayles.

In a case similar on its facts, this Honorable Court more than ten years ago required a finding of an:

> . . .*affirmative link* between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners — express or otherwise — showing their authorization or approval of such misconduct. Instead, the *sole* causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, . . .

Rizzo v. Goode, 423 U.S. 362, 371 (1976). (Emphasis supplied).

This Honorable Court recently had occasion to re-emphasize this causality requirement.

> At the very least there must be an *affirmative link* between the policy and the particular constitutional violation alleged.
>
> . . . .
>
> *Proof of a single incident of unconstitutional activity is not sufficient to impose liability under* Monell, *unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy,* which policy can be attributed to a municipal policymaker.

Tuttle, supra, 471 U.S. at 823-24. (Emphasis supplied).

> In this regard, we cannot condone the loose language in the charge leaving it to the jury to determine whether the alleged inadequate training would likely lead to 'police misconduct.' The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell's* requirement that the particular policy be the 'moving force' behind a *constitutional* violation. There must at least be an *affirmative link* betwen the training inadequacies alleged, and the particular constitutional violation at issue.

Tuttle, supra, 471 U.S. at 824-25 n.8. (Emphasis supplied).

And in the most recent discussion of this essential element, this Honorable Court imposed an even more stringent test.

> Although there was no opinion for the Court [in *Tuttle*] on this question, both the plurality and concurring opinions found plaintiff's submission inadequate because she *failed to establish that the unconstitutional act was taken* pursuant *to a municipal policy rather than simply resulting from such a policy in a* 'but for' *sense.*

Pembaur, supra, 89 L.Ed.2d at 464-65 n.11. (Emphasis supplied).

In the instant case, Harris has utterly failed to show that any custom of City, directly or indirectly, caused her injuries at the hands of Hayles. Harris's claims of negligence against City are not only totally insufficient to constitute a claim against the City under §1983, but remain completely unproven. Nor did Harris show or even maintain that the custom "itself was unconstitutional," as required in *Tuttle, supra.*

Harris failed to offer any evidence of any complaint of police misconduct made to the police department, which was either not properly investigated or in regard to which appropriate and warranted action was not taken. Without such a showing, mere allegations of improper investigations or of the failure of warranted discipline, or even of no investigations of incidents which were groundless (there being no evidence of actual misconduct), cannot possibly have sufficed as the legal causal nexus of Harris's sexual assault by Hayles.

> '[A] governmental entity is liable under §1983 only when the entity itself is a "moving force" ' behind the deprivation, *Polk County v. Dodson,* 454 U.S. 312, 326 (1981).

Kentucky v. Graham, 473 U.S. 159, 166 (1985).

Evidence of even a thousand complaints by disgruntled arrested suspects cannot suffice to constitute a culpable policy under *Monell,* without additional evidence that one or more of

said complaints were true and based on actual police misconduct.

V

The Action Or Inaction Of A Single Member Of A Duly Elected Legislative Body, Who Has Not Been Delegated Any Specific Or Individual Authority By That Body, Cannot Establish A Municipal Custom Under 42 U.S.C. §1983.

City is a fourth-class city existing and operating pursuant to Revised Statutes of Missouri, Chapter 79. R.S.Mo. §79.110, *et seq.* expressly provide for the operation of City under the legislative direction of its Board of Alderpersons. The Board may only act as a collective body, and no one member of the Board can undertake any singular action on its collective behalf. It is the duly constituted legislative body of the City, which establishes policy only by a majority vote of a duly constituted quorum.

A fair reading of *Monell, supra,* and its progeny bars any individual member of a legislative body from adopting or creating a custom on behalf of the body, such as permitted here by the giving of Special Interrogatory No. 3(c) (Tr.7/133; Apx. at A27) and the jury's affirmative finding in that regard. (Tr.7/149). There was no evidence that the Board had ever delegated such authority to any individual member of the body.

Special Interrogatories No. 3(a) expressly permitted a finding of culpability by either "the collective *or individual* actions or inactions of the members of the Board of Alderpersons." (Tr.7/133; Apx. at A27) (emphasis supplied) and City objected to the giving of such instruction. (Tr. 7/16-17).

Each member of City's Board of Alderpersons who testified, as well as the Mayor and City Attorney, averred a uniform policy of referring citizen complaints against police officers to the department for the filing of a written report. (T.3/31, 3/138, 6/143, 6/227, 7/22). There was no evidence before the jury of

any proven act of misconduct brought to the City's Board's attention, upon which it failed to take appropriate corrective action. Certainly, the City's Board cannot be faulted for unanimously requesting an independent investigation by the St. Louis County Police Department of the Prothro allegation. Nor can the City's Board be faulted for allowing the matter to rest after its own investigation, after investigation by its police department, and after the St. Louis County Police Department investigation, all concluded the allegations were unfounded. It is difficult to surmise what possible misfeasance or malfeasance may be attributed to the City's Board.

An individual member of a legislative body, to whom specific authority has not been delegated by the body, is only an employee for purposes of §1983, and municipal responsibility does not lie under the theory of respondeat superior for said individual's acts. A municipality is only liable for "decision[s] by its properly constituted legislative body." *Pembaur, supra,* 89 L.Ed.2d at 463.

Whenever municipal liability has been imposed by reason of the act of a single municipal official, the official has always been an executive or judicial officer, and never one member of the legislative body.

CONCLUSION

WHEREFORE, for the reasons, law, equity and other considerations herein presented, Petitioner City prays this Honorable Court to grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

No. 86-2022

Ellena Harris,
Appellee,

v.

City of Pagedale,
Appellant,

Michael Hayles,
Defendant.

Submitted Feb. 12, 1987
Decided June 17, 1987

Frank Susman, St. Louis, Mo., for appellant.

William Edward Taylor, St. Louis, Mo., for appellee.

Before HEANEY, McMILLIAN and FAGG, Circuit Judges.

McMILLIAN, Circuit Judge.

Ellena Harris brought this action under 42 U.S.C. § 1983 against the City of Pagedale, Missouri (the City), and against Michael Hayles, formerly a City police officer. Officer Hayles falsely arrested Harris and, while she was in police custody, sexually assaulted her. In bringing this action, Harris alleged Officer Hayles violated her civil rights by the assault. She also alleged the City was liable because, before the assault, municipal officials in positions of final authority had been deliberately indifferent to many citizen complaints of physical and sexual misconduct by Hayles and other police officers. The jury returned a verdict against both Officer Hayles and the City and awarded Harris $200,000 in damages. The District Court[1]

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[1] By consent of the parties, this case was tried to a magistrate, the Honorable David D. Noce, United States Magistrate for the Eastern District of Missouri, pursuant to 28 U.S.C. § 636(c)(3).

for the Eastern District of Missouri entered final judgment on the verdict. The City now appeals.[2]

For reversal, the City contends (1) the evidence did not establish the existence of a City custom or policy, a requisite for municipal liability under § 1983; (2) members of the Board of Aldermen or the Chief of Police did not have the final policymaking authority to establish the City custom or policy alleged; and (3) this City custom or policy did not proximately cause Officer Hayles to sexually assault Harris. For the reasons discussed below, we affirm the judgment of the district court.

I.

Sometime after midnight on January 29, 1985, Officer Michael Hayles stopped Harris's car on a city street. Officer Hayles was in uniform and driving a patrol car. Officer Hayles told Harris he had pulled her over because she had run a red light, which Harris denied. Officer Hayles handcuffed Harris, put her in his patrol car and drove her to the City police station. At the station, Officer Hayles took Harris to an office, where he sexually fondled her and told her to "cooperate with him" if she wanted to go home and not get into any trouble. Harris said Officer Hayles told her he had stopped "lots of women" like this before and, if they did what he asked, he let them go.

Officer Hayles then took Harris out of the police station, put her in his patrol car and drove to a cemetery across the street. Harris said Officer Hayles told her, "I always come over here when I can't go to a hotel." In the cemetery, Officer Hayles repeatedly raped and sodomized Harris.

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[2] Hayles appeared *pro se* at the trial and does not appeal the verdict. Before the trial, Hayles had pled guilty in state court to a criminal charge of sodomy for the sexual assault on Harris and was sentenced to five years probation.

Before taking her back to her car, Harris said Officer Hayles warned her that he would make trouble if she told anybody what had happened. He specifically threatened to have her put in jail and to have her children taken away from her. On two occasions after the assault, Officer Hayles went to Harris's house and attempted to talk to her.

II.

The central issue in this appeal is whether the City, as well as Officer Hayles, is liable for Harris's sexual assault under 42 U.S.C. § 1983. Harris alleged the City was liable because there was a municipal custom of failing to receive, investigate and act on citizen complaints of physical and sexual misconduct by City police officers. To establish that this municipal custom existed, Harris presented evidence of prior incidents of police sexual misconduct, including prior incidents involving Officer Hayles, and evidence that various City officials in positions of authority and responsibility had received notice of these incidents. Because the City challenges the sufficiency of the evidence to establish the municipal custom alleged, we will set out in detail the evidence in this case.

Harris testified that Officer Hayles admitted that he had falsely arrested and sexually assaulted other women. Her testimony was corroborated by extensive evidence of prior incidents of sexual misconduct involving Officer Hayles.

1983 Incident

Several witnesses testified about Officer Hayles' alleged sexual assault of a young woman in the summer of 1983 ("the 1983 incident"). The young woman claimed Officer Hayles had arrested her, taken her to a small, dark room at the police station, thrown a coat over her head, and sexually fondled her. City police officer Arthurine (Tina) Jones testified that she was in the police station on the night the young woman was arrested.

Jones said she was at the dispatcher's desk in the front of the station when she heard a woman crying and went down the hall to investigate. Jones walked into an office and found Officer Hayles and the young woman in the room with the lights off. Jones said the young woman was crying hysterically. City police lieutenant Allean Helms was also on duty at the station that night. She testified for the City that she did not see or hear anything unusual.

The young woman involved in the 1983 incident did not testify at the trial. Her allegations were testified to by Frederick Searcy, a family friend.[3] Searcy said he was contacted by the young woman's mother following the incident and had accompanied the mother and daughter to a meeting about the incident with then City Chief of Police Odis Williams. Searcy testified that at this meeting Chief Williams acknowledged that he had received other citizen complaints of sexual misconduct by Officer Hayles. The young woman lodged a formal complaint against Officer Hayles, and Chief Williams promised to conduct an investigation. On June 21, 1983, the police chief wrote to the young woman's mother; the letter was introduced into evidence at the trial. Chief Williams stated in the letter that he had interviewed Officer Hayles and other officers on duty at the police station on the night of the young woman's arrest. Williams said he was suspending Officer Hayles for two days for "questioning a female prisoner in an isolated area in the police department without the presence of a female officer."[4]

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[3] As to this, and all other hearsay reports of past complaints of police misconduct admitted into evidence, the district court repeatedly instructed the jury to consider the testimony only as proof that the City had received notice of such prior complaints and not as proof of the validity of the complaints.

[4] It is unclear from the record whether this suspension was in fact ever ordered.

The young woman also filed a complaint against Officer Hayles with the St. Louis County Police Department. Detective Alysia Johns investigated the charge. Detective Johns testified that she notified Chief Williams of the charge against Officer Hayles in the course of the investigation. The investigation was eventually dropped, Johns said, because the victim refused to cooperate.

The young woman and her family also made complaints to City Mayor Mary Hall and to Louise Hall, a member of the Board of Aldermen, the City's government body. (Mayor Hall and Alderwoman Hall are not related.) At trial, both City officials acknowledged that they had spoken personally with the young woman about the incident and said that they had believed her allegations against Officer Hayles.

Alderwoman Hall and Mayor Hall called a meeting of the Board of Aldermen to discuss the 1983 incident. At the meeting, the Board unanimously voted to refer the matter to the St. Louis County Police Department for investigation. The investigation resulted in a finding that the complaint was unfounded. The Board received this finding in October 1983 and decided to briefly suspend Officer Hayles for interviewing a female suspect without a female officer present in violation of police department policy.

Lieutenant Greenbaylum Walker of the Northwoods, Missouri, Police Department testified about another incident of sexual misconduct involving Officer Hayles. Lieutenant Walker said that in August or September 1983, during the course of an investigation, he had videotaped an interview with a female suspect who lived in the City. A few days after this interview, Lieutenant Walker telephoned Mayor Hall at City Hall and said:

> I have viewed a videotape of a person that was in the custody of our department that had statements on it concerning a member of [Mayor Hall's] police department

> that I felt she should be apprised of that could probably cause problems later if something wasn't done.

Lieutenant Walker told Mayor Hall that the police officer involved was Officer Hayles. At Lieutenant Walker's invitation, Mayor Hall and Alderwoman Hall went to the Northwoods Police Department to see the videotape. Lieutenant Walker said he told the mayor then that he thought the videotape could cause trouble in the future. He explained at trial that he meant to warn Mayor Hall "either the person was not telling the truth and will continue to spread the rumor and that would be a problem I could foresee, or the person was telling the truth and there could be a possibility of someone being assaulted."

Alderwoman Hall described the videotape interview at trial. The suspect said that Officer Hayles had stopped or arrested her many times in the City, had always "made deals" with her, had threatened to charge her if she refused to do as he told her, usually took her to the cemetery or to a hotel, and several times had tied her up and taken nude photographs of her.[5] Alderwoman Hall testified that she believed the suspect's story and that she had concluded by the time she saw the videotape that Officer Hayles was "a sexual freak."

Mayor Hall gave a similar account of the videotape interview and testified that she, too, believed the woman's story. Mayor Hall said she informed the Board of Aldermen and the City At-

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[5] Certain details of the videotape allegations were corroborated by other evidence. Officer Hayles apparently kept sexually explicit magazines and other sexual paraphernalia in his desk and briefcase at the police station. Officer Tina Jones was ordered to clear out Officer Hayles's desk in the back office of the police station following the Harris assault. Jones testified that she found what she described as pornographic bondage magazines in Officer Hayles's desk. Alderman John Taylor testified that he was in the company of police supervisors on an occasion when Officer Hayles's briefcase was opened. Taylor reported that the briefcase contained pornographic bondage magazines and lengths of rope.

torney about the suspect's allegations against Officer Hayles. Alderwoman Hall denied the mayor had ever informed the Board of Aldermen about the videotape. The videotape was played for the jury at the trial.

January 1985 Incident

There was testimony about another incident of sexual misconduct involving Officer Hayles. A female City resident testified that in January 1985, Officer Hayles stopped her car and found a small amount of marijuana in her purse. Officer Hayles handcuffed the woman, put her in his squad car and drove her to the police station. He took her to a small room and kissed and sexually fondled her. The woman testified Officer Hayles offered to let her go in exchange for sex and that she consented because she feared for her life. Officer Hayles arranged to meet the woman later that night in front of her apartment building. Officer Hayles came to her apartment building that night, but the woman said she did not go outside to meet him. The following night, Officer Hayles caught the woman outside her apartment building and insisted that she meet him later. Again she did not meet Hayles and testified that he telephoned her several times after that. She did not report the incident to any City official.[6]

Other Incidents

Mayor Hall testified that she had personally received complaints from three other female City residents of further incidents of sexual misconduct involving Officer Hayles. The women were identified by name at trial. The first complainant told the mayor that Officer Hayles had arrested her, locked her up, tied her feet and sexually approached her. Mayor Hall said

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[6] The district court instructed the jury to consider evidence of unreported incidents of police misconduct only as evidence that such prior incidents had occurred and not as evidence that the City had had notice of such prior misconduct.

she communicated this complaint to Alderman Taylor, the City Attorney and the Board of Aldermen. The second complainant said that Officer Hayles had locked her in a cell at the police station and then watched her through the closed circuit television camera, which made her afraid to go to the bathroom. Mayor Hall said she reported this incident to the Board of Aldermen. A third woman complained to the mayor that Officer Hayles had arrested her and tied her up with rope. Mayor Hall said she reported this incident to Alderwoman Hall and the City Attorney.

A portion of Officer Hayles's deposition was read to the jury at the trial. Officer Hayles said in deposition that in January 1985, he was approached on the street by a City police department official, who informed him that a complaint had been filed against him by a female City resident. The woman alleged that Officer Hayles had come to her home and tried to force her to allow him to date her teenaged daughter.

Mayor Hall testified that she had also received prior complaints of sexual misconduct against former Chief of Police Williams. Two women, identified by name at trial, had complained that Chief Williams had forced them to commit oral sex in his squad car. In November 1982, the mayor wrote a letter to the Board of Aldermen. The letter was admitted into evidence at the trial. The letter informed the Board that complaints of sexual misconduct had been made against Officer Hayles, Chief Williams, and another City police officer, Ricky Collins. The mayor asked the Board to discipline all three officers. Alderwoman Leatrice Dowd testified that the Board had received this letter, but acknowledged that they took no action in response.

Several City officials testified about personally receiving many other complaints of sexual misconduct by City police officers that they recalled in less detail. Alderwoman Hall testified that she "knew of" a complaint against Officer Collins connecting him with a statutory rape. Alderman Taylor

testified that he had received a newspaper article in the mail from an unknown source alleging that Collins had raped a fifteen-year old girl. Taylor said he talked about the complaint with Chief Williams and with Alderwoman Hall. Alderwoman Dowd testified that she, too, had received a complaint of sexual misconduct involving Officer Collins and also several complaints that he had used excessive physical force. Alderwoman Dowd also indicated that she had received several reports from citizens that City police officers were seen taking women into the cemetery located across the street from the police station. Alderman Taylor testified that during his two-year term in office (April 1983 to April 1985), he had received between 15 and 20 anonymous complaints of sexual misconduct by City police officers. Taylor said it was his practice to refer all complaints of police misconduct to Chief Williams, even when callers told him the alleged misconduct involved Chief Williams.

Assistant United States Attorney David Rosen testified that he had received numerous complaints about civil rights violations by City police officers. He wrote a letter to Chief Williams dated August 23, 1982, that was introduced into evidence at the trial. In the letter, Rosen cites the increasing number of civil rights complaints.

III.

A municipality is liable under § 1983 for unconstitutional acts by its officials or employees that implement or execute a municipal custom or policy, but may not be held vicariously liable for unconstitutional acts by employees. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986) (*Pembaur); Monell v. Department of Social Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978) (*Monell).* The City asserts that Harris's claim against it is based solely on the vicarious liability theory of *respondeat superior.*

Harris denies that her claim against the City is based on a theory of vicarious liability. She argues instead that the City is

directly responsible for her injury because municipal officials were deliberately indifferent over the years to a known pattern of unconstitutional actions by City police officers. She alleges there existed in the City a municipal custom[7] of failing to receive, investigate or act on citizen complaints of physical and sexual misconduct by police officers.

This court has held that where a § 1983 claim is based on a municipality's alleged failure to prevent misconduct by its employees, the city is liable only where municipal officials can be shown to be directly responsible for the improper actions of their subordinates. *Wilson v. City of North Little Rock,* 801 F.2d 316, 322 (8th Cir.1986) (*Wilson*). The claimant must demonstrate "deliberate indifference or tacit authorization [by municipal officials] of the offensive acts by [failure] to take remedial steps following notice of a pattern of such acts by ... subordinates." *Id.* Thus, to prove her case, Harris had to show that City officials had notice of prior incidents of police misconduct and had deliberately failed to act on this knowledge.

The City argues that the evidence of past incidents of sexual misconduct by Officer Hayles and other police officers was either uncorroborated or hearsay or both. Hence, although Harris introduced copious evidence of past misconduct, the City argues the evidence was not reliable. Even if such prior incidents actually happened, the City denies that City officials had notice of most of these actions. In those instances where City officials acknowledged receiving citizen complaints of such incidents, the City denies that Harris demonstrated any pattern of deliberate indifference in their handling of these complaints.

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[7] A municipal custom is a practice of municipal officials that is not authorized by written law, but which is "so permanent and well-settled ... as to [have] the force of law." *Monell v. Department of Social Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978), *citing Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970).

The City concedes that City officials may not have diligently pursued citizen complaints, but argues that this inaction demonstrates, at worst, mere negligence and not deliberate indifference to a known pattern of unconstitutional police conduct, citing *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), and *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (negligence does not give rise to a § 1983 claim based on due process violation).

Harris refutes the City's claim that there was no reliable evidence of repeated prior incidents of sexual misconduct by Officer Hayles and other police officers. She and another alleged victim testified at trial that they were sexually assaulted by Officer Hayles. In addition, City officials and City residents testified that similar accusations had been made against Officer Hayles and other police officers by many other victims. Harris also challenges the City's assertion that municipal officials had no notice of these prior incidents. Several City officials acknowledged many times at trial that they were aware of past incidents of sexual misconduct by City police officers, that they had received many citizen complaints of such incidents and that they had, on occasion, notified other members of City government about citizen complaints. Harris points out that despite such notice, City officials did not investigate or respond to citizen complaints of sexual misconduct by police officers in any meaningful way. According to Harris, City officials were more than just negligent because they persistently failed to remedy a known and continuing pattern of unconstitutional police misconduct.

In *Herrera v. Valentine,* 653 F.2d 1220 (8th Cir.1981) (*Herrera),*[8] this court affirmed the liability of the City of Gordon,

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[8] That portion of our decision in *Herrera v. Valentine,* 653 F.2d 1220 (8th Cir.1981) (*Herrera),* permitting damages awards based on the abstract value of constitutional rights was disapproved in *Memphis Community School Dist. v. Stachura,* ____ U.S. ____, 106 S.Ct. 2537, 2541 n. 5, 2543-45, 91 L.Ed.2d 249 (1986). In all other respects, however, *Herrera* remains good law in this circuit.

Nebraska, under § 1983 for injuries to JoAnn Yellow Bird, an Indian woman who was severely beaten by a Gordon police officer. Yellow Bird alleged there existed a pattern of police brutality against Indians that was well known to municipal officials. She presented evidence of many prior citizen complaints to the City of Gordon and to state agencies about police mistreatment of Indians, and also the report of an outside investigation criticizing the City of Gordon's operation of its police department. *Id.* at 1225. Finding persuasive the evidence that the City of Gordon knew of a serious problem of racially-motivated police brutality, we held the municipality's failure to address or correct the known problem amounted to "deliberate indifference to ... violations of a citizen's constitutional rights" sufficient to sustain municipal liability under § 1983 for Yellow Bird's beating. *Id.* at 1224-25.

The amount and specificity of proof of direct municipal involvement offered in *Herrera* contrasts with that offered by the § 1983 claimant in *Wilson,* 801 F.2d 316. In *Wilson,* the plaintiff sought to hold the Chief of Police of the City of North Little Rock liable for a police roadblock set up one evening outside a local skating rink, allegedly for the purpose of harassing black customers. The theory of liability was that the police chief had failed to prevent an unconstitutional police action by his subordinates. There was no evidence that the Chief of Police knew of the roadblock until the day after it was completed. Nonetheless, as evidence that the police chief had tacitly authorized the roadblock, the plaintiff argued in general terms that the police chief had supervisory authority over his subordinates and offered vague testimony by another police officer that "there was very little done ... that he didn't direct." *Id.* at 323. We held this evidence insufficient to show that the Chief of Police had tacitly authorized the roadblock. *Id.*

We are satisfied that Harris has proved the existence of the municipal custom she has alleged and we uphold the jury verdict in her favor. When we review a challenge to the sufficiency of

the evidence supporting a jury verdict, we consider all the evidence in the light most favorable to the verdict. *Herrera,* 653 F.2d at 1224 n. 2. Considered in this light, the evidence in this case clearly establishes that there was a pattern of sexual misconduct by City police officers, especially Officer Hayles, that on repeated occasions City officials in positions of authority and responsibility were notified of the offensive acts, but that upon receiving such notice, these City officials repeatedly failed to take any remedial action. We conclude this amounts to deliberate indifference to police abuses. Thus, we hold that Harris has proved the existence of a municipal custom sufficient to support municipal liability under § 1983.

IV.

The City next contends that the evidence does not support the jury's findings that members of the Board of Aldermen and the Chief of Police had the final policymaking authority to establish the municipal custom alleged. The City also contends that the jury was erroneously instructed that the actions of a single member of the Board of Aldermen could establish a municipal custom.[9]

Not every action by a municipal official will subject a city to liability under § 1983. "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur,* 106 S.Ct. at 1299 (plurality opinion) (footnote omitted); *see Williams v. Butler,* 802 F.2d 296, 299 (8th Cir.1986) (banc).

Several members of the Board of Aldermen and the City Attorney testified at trial about the scope of policymaking authority of City officials in the areas of police discipline and response

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[9] The jury found that a municipal custom had been established in this case by "the collective or individual actions or inactions of the Board of Aldermen." Special Interrogatory 3C.

to citizen complaints of police misconduct.[10] It was apparently the usual practice of individual members of the Board of Aldermen to refer citizen complaints of police misconduct to the Chief of Police for investigation. The Chief of Police had the general supervisory authority to discipline police officers. The Board of Aldermen, however, retained the final authority to discipline or to fire a police officer. Thus, while the Chief of Police could suspend or discipline an officer for a brief period of time on his own authority, the sanction did not become official until the Board had approved it.

In practice, the Board of Aldermen's approval or disapproval of police discipline worked like an appeal procedure. The disciplined officer could protest the police chief's initial decision by bringing the matter before the Board of Aldermen. If the officer was satisfied with the discipline or lack of discipline imposed, and the Board of Aldermen did not take the matter up of its own accord, the Chief of Police's decision simply ended the matter. Alderman Taylor recalled 10 or 15 occasions when Chief Williams suspended officers on his own authority and the matter did not come before the Board of Aldermen.

The City argues first that no individual member of the Board of Aldermen has the authority to establish a municipal custom because, under state law, the Board exists and can act only as a collective body. Rev. Stat.Mo. § 79.110 *et seq.* Based on this premise, the City claims that only the actions of the Board of Aldermen as a whole can establish City custom or policy. The City stresses that when the Board of Aldermen as a collective body was notified of the 1983 incident, they responded immediately and ordered an independent investigation.

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[10] The evidence presented at trial about the scope of the policymaking authority of the mayor is not relevant to this appeal. The jury found that the mayor's conduct did not, in this case, establish a municipal custom. Harris does not appeal this finding.

Harris challenges the City's premise that only the actions of the Board of Aldermen as a collective body are relevant. This is a case alleging a municipal custom, she contends. By definition, custom is unofficial, that is, a course of conduct that has not been approved through formal policymaking channels. Thus, Harris argues, statutory requirements for formal action by the Board of Aldermen as a deliberative and legislative body are not relevant.

The only relevant issue, Harris continues, is whether individual members of the Board of Aldermen had the power to make informal City policy through their conduct. Members of the Board of Aldermen testified that they had the authority to receive citizen complaints of police misconduct and to bring complaints to the attention of the Board of Aldermen as a whole. From this evidence, Harris argues that the jury could reasonably have concluded that individual members of the Board of Aldermen had final policymaking authority in the area of police discipline and response to citizen complaints of police misconduct.

The City also contends the evidence does not support the jury finding that the Chief of Police had the final policymaking authority to establish the municipal custom alleged. The City argues that while the police chief could initially impose discipline on a police officer, he did not have the *final* authority to hire, fire, suspend, or discipline police officers, citing *Pembaur,* 106 S.Ct. at 1300 n. 12 (plurality opinion) (a policymaking official's discretion in the exercise of particular function does not, without more, support municipal liability where the official cannot also be shown to be responsible for establishing *final* government policy respecting such activity).

Harris points out that the Chief of Police alone was responsible for disciplining police officers short of suspension or firing. She also argues that because the police chief had the duty to investigate charges against officers, he could, and the evidence

shows he did, fail to investigate or choose to exonerate officers at his discretion. Because police discipline matters generally came before the Board of Aldermen only if the officer involved appealed the sanction imposed, where an officer was not investigated or was cleared of a charge, the Chief of Police's decision was final.

We conclude the evidence supports the jury finding that the Board of Aldermen, as a whole, or its members, individually, as well as the Chief of Police, had the final authority at issue in this case—the authority to exonerate police officers of disciplinary charges or not to bring any disciplinary action against them at all. We hold, therefore, that these City officials had the final policymaking authority to establish a municipal custom of deliberate indifference to a known pattern of unconstitutional police misconduct.

V.

The City finally contends that even if City officials in a position of authority and responsibility had established a municipal custom of ignoring reports of sexual misconduct by City police officers, Harris failed to demonstrate that this municipal practice proximately caused her sexual assault. Municipal liability under § 1983 cannot be premised on the mere fact that the unconstitutional act resulted from a municipal custom in a "but for" sense; it must be shown that the act was taken "pursuant to" the custom, *i.e.*, that the municipal custom was "the moving force of the constitutional violation." *Pembaur,* 106 S.Ct. at 1299-1300 n. 11 (plurality opinion) (citation omitted); *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037. The City argues that Harris failed to show that any citizen complaint of police misconduct was not properly dealt with by City officials and has thus failed to show how City inaction caused her sexual assault.

Harris responds that she documented numerous occasions where City officials failed to properly investigate or act on citizen complaints of police misconduct. There was evidence

that individual members of the Board of Aldermen who received citizen complaints routinely referred complaints to the Chief of Police and did not follow up on the complaints. This was routine procedure even though the police chief was himself implicated by several complainants in the pattern of sexual misconduct. In only one instance (the 1983 incident), did City officials call for an independent investigation into a citizen charge of police sexual misconduct. On most other occasions, the Board did not respond at all.

We held in *Herrera* that a municipality's continuing failure to remedy a known pattern of police brutality against Indians in the community caused the subsequent beating of an Indian woman by a police officer. 653 F.2d at 1225. *See also Baker v. McCoy,* 739 F.2d 381, 384-85 (8th Cir.1984) (claimant must show pattern of prior similar incidents). Where it becomes clear that a police force needs close and continuing supervision because of a known pattern of misconduct, and the municipality fails to provide such supervision, "the inevitable result" is a continuation of the misconduct. *Herrera,* 653 F.2d at 1225. There can be no question that the Harris assault was similar to many other sexual violations committed by Officer Hayles and by other City police officers. We thus conclude that the City's long-standing evasion of a problem of persistent sexual misconduct by police officers proximately caused the subsequent sexual assault of Harris by a City police officer. The Harris assault was an unconstitutional act taken pursuant to the City custom of deliberate indifference to such acts by its police officers.

In summary, we hold the evidence supports the jury verdict that: (1) there existed in the City a municipal custom of failing to receive, investigate and act upon complaints of physical and sexual misconduct by police officers, (2) the Board of Aldermen, its individual members, and the Chief of Police had the final policymaking authority to establish the municipal custom alleged in this case, and (3) this municipal custom proximately caused Harris's assault by a City police officer. Accordingly, the judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUT

No. 86-2022EM

Ellena Harris,
Appellee,

v.

City of Pagedale, Missouri,
Appellant,

and

Michael Hayles.

APPELLANT CITY OF PAGEDALE'S MOTION AND SUGGESTIONS IN SUPPORT THEREOF FOR REHEARING AND/OR REHEARING EN BANC

Comes now Appellant City of Pagedale and pursuant to F.R.A.P. Nos. 35 and 40 and Eighth Circuit Rules Nos. 15 and 16, requests a rehearing and/or rehearing en banc of this Honorable Court's Opinion filed in this cause on June 17, 1987.

With all due respect, this Honorable Court's Opinion filed on June 17, 1987, and authored by the Honorable Theodore McMillian, Circuit Judge, has largely ignored the trial evidence and has completely overlooked Appellant's primary legal points on appeal.

Reconsideration is absolutely necessary to secure and to maintain uniformity of this Circuit's Opinion. This case involves a question of exceptional importance, inasmuch as the Opinion as filed totally flies in the face of prior case law under 42 U.S.C. §1983.

The Opinion is replete with statements totally unsupported by the Transcript. By way of example only, the Opinion states that

both Mayor M. Hall and Alderperson L. Hall "had spoken personally with Michelle Prothro." (Slip Op. at 5). The Transcript clearly indicates that Mayor M. Hall only heard of the complaint third-hand from Alderperson L. Hall (T.6/183-84) and that Alderperson L. Hall had heard of the incident second-hand from Ms. Prothro's brother (T.2/201). Neither witness ever spoke to Ms. Prothro.

The Opinion cites in detail the "*January 1985 Incident*" (Slip Op. at 7) and relies upon this incident (Slip Op. at 11); despite the fact the victim testified that she, her mother, and Defendant Hayles were the only persons aware of the incident, and despite the fact that the Trial Court expressly admonished the jury that this evidence was "not to be considered as evidence of any custom, policy or practice by the City of Pagedale." (T.3/202-03).

The Opinion repeatedly speaks of "evidence of prior incidents of police sexual misconduct" (Slip Op. at 4), "extensive evidence of prior incidents of sexual misconduct involving Officer Hayles" (Slip Op. at 4), "copious evidence of past misconduct" (Slip Op. at 11), "known and continuing pattern of unconstitutional police misconduct" (Slip Op. at 12), "a pattern of sexual misconduct by City police officers, especially Officer Hayles" (Slip Op. at 13), "many other sexual violations committed by Officer Hayles and by other City police officers" (Slip Op. at 18), and "persistent sexual misconduct by police officers" (Slip Op. at 18).

To the contrary, in this case not one whit of evidence was permitted by the Trial Court to be received by the jury as to any act of physical or sexual misconduct by either Officer Hayles or any other Pagedale police officer. The Trial Court was consistent in its rulings, because not a single alleged victim or witness to any such incident testified at trial. Rather, there was an abundance of second-hand and third-hand allegations of incidents, all of which the Trial Court correctly ruled could not be considered as

evidence of prior misconduct. Yet the Opinion regretably fell into the same trap as the jury and accepted the fallacious premise that repeated evidence of hearsay and inadmissible complaints of misconduct constitutes actual evidence of prior misconduct.

Neither the Appellee nor the Opinion cited to a single instance in the Transcript of any *admitted* evidence of prior physical or sexual misconduct by any Pagedale police officer.

This Circuit, as do all other Circuits, has a long history of cases requiring *proof* of actual prior misconduct. See: *Williams v. Mensey,* 785 F.2d 631, 635-36 (8th Cir. 1986); *Baker v. McCoy,* 739 F.2d 381, 384 (8th Cir. 1984); *Patzner v. Burkett,* 779 F.2d 1363, 1367 (8th Cir. 1985). Rumored reports of misconduct are not evidence of either actual misconduct or of known misconduct and certainly cannot satisfy the requirements for municipal liability under *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978).

The Opinion relied entirely upon evidence admitted by the Trial Court for one purpose (as evidence of complaints) and expressly excluded by the Trial Court for the purpose for which the Opinion repeatedly cited and relied upon it (as evidence of actual or known actual prior misconduct).

There exists not a single case in this or any other Circuit in which actual evidence and proof of prior misconduct was not required and presented for a finding of municipal liability, as the result of an isolated act of a low-level, non-decision making municipal employee.

The Opinion relied upon *Wilson v. City of North Little Rock,* 801 F.2d 316 (8th Cir. 1986) (Slip Op. at 11). In *Wilson,* the municipality was found not liable for lack of any prior knowledge and cited as support *Marchant v. City of Little Rock,* 741 F.2d 201 (8th Cir. 1984) (*Wilson,* 801 F.2d at 322). In *Marchant,* as in all other cases in this Circuit (except the instant

case) and in all other Circuits, this Honorable Court refused to find municipal liability.

> In her complaint, Marchant stated that the City of Little Rock has a history of indifference and neglect to the medical needs of prisoners in its jails. . . The record in this case does not, however, contain proof of such a policy.

Marchant, 741 F.2d at 204.

The Trial Court required evidence that a Pagedale police officer has previously "sexually and physically assaulted" any person "in a punitive manner which violated the Fourteenth Amendment to the Constitution," which assault was *known* to a City official. (Special Interrogatories No. 1). There was not a single whit of evidence in this case to that effect.

If mere hearsay complaints against police officers by individuals who refuse to file written complaints, as per the City's policy (as opposed to any evidence of the facts forming the basis of such complaint) can establish municipal liability, no City is safe from judgment. There exists not a single police department against which rumored complaints cannot be found. Every municipal official who testified, whether for Appellant or for Appellee, affirmed the policy of referring citizen complaints to the police department for the filing of a written complaint. There was no evidence that any formal complaint was ever made, much less not thoroughly investigated or appropriate disciplinary action not taken.

The Opinion's imprimatur upon a verdict of municipal liability, without any admissible evidence of actual prior misconduct, destroys the very heart of *Monell.*

The Opinion also sanctioned, without any statutory or case law authority to support it, the proposition that a *single* member of a legislative body can establish a policy or custom on behalf of the municipality under *Monell.*

Lastly, the Opinion by assuming municipal knowledge of actual prior misconduct (without evidence of the same) incorrectly proceeded to find an affirmative link and causal relation between a municipal custom and Plaintiff's rape by Defendant Hayles. It is inconceivable that mere hearsay reports of prior misconduct, without any evidence of actual and known misconduct, could be deemed the cause in a "but for" sense of Plaintiff's rape. *Pembaur v. City of Cincinnati,* 475 U.S. ____ (1986), 89 L.Ed.2d 452, 464-65 n.11.

Pursuant to Eighth Circuit Rule No. 16(d), undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the Opinion is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978); *Williams v. Mensey,* 785 F.2d 631 (8th Cir. 1986); *Baker v. McCoy,* 739 F.2d 381 (8th Cir. 1984); *Patzner v. Burkett,* 779 F.2d 1363 (8th Cir. 1985); *Marchant v. City of Little Rock,* 741 F.2d 201 (8th Cir. 1984); and *Pembaur v. City of Cincinnati,* 475 U.S. ____ (1986), 89 L.Ed.2d 452.

Undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

I. Whether a finding of a municipal custom can be premised upon a single act of misconduct by a low-level non-decision making municipal employee, in the total absence of any evidence of known prior and similar misconduct?

II. Whether a single member of a legislative body can establish a municipal custom under *Monell?*

III. Whether under *Pembaur,* in the total absence of evidence of known prior and similar misconduct, the misconduct of a low-level non-decision making municipal employee may be deemed to have been caused in a "but for" sense by a pattern of hearsay, but unproven, prior similar complaints?

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was delivered or mailed first class, postage prepaid, to all parties or counsel of record, as below reflected, this 30th day of June, 1987.

/s/ Frank Susman /fo

William Edward Taylor
Ross Harry Briggs

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2022-EM

Ellena Harris,
Appellee,

v.

City of Pagedale,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 28, 1987

Order Entered at the Direction of the Court:

Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX D

INSTRUCTION NO. 9

Whether an official custom exists is a question of fact for you to determine. A custom is a course of conduct of deliberate indifference by city officials and consisting of persistent and widespread practices that are permanent and well settled or are deeply embedded traditional ways of carrying out policies, so as to have the force of law, although not formally adopted or announced by the municipality.

The defendant City of Pagedale denies that plaintiff was injured or damaged as a result of any City custom.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-386 C (5)

Ellena Harris,
Plaintiff,

v.

City of Pagedale, et al.,
Defendants.

SPECIAL INTERROGATORIES

1. Do you the jury find by a preponderance of the evidence that on January 29, 1985 defendant Michael Hayles sexually and physically assaulted plaintiff Ellena Harris in a punitive manner which violated the Fourteenth Amendment to the Constitution? Answer: Yes (Yes or No)

Note: If the answer to No. 1 is Yes, then answer No. 2 and all parts of No. 3:

2. What compensatory damages, if any, do you the jury find by a preponderance of the evidence that plaintiff Ellena Harris suffered as a direct result of the acts described in Interrogatory No. 1? Answer: Yes Dollars ($200,000.00)

3. Do you the jury find by a preponderance of the evidence that a custom of the defendant City of Pagedale, Mo., as the term "custom" is defined in the instructions, in failing to receive, investigate, and act upon complaints of physical or sexual misconduct by its police officers against other persons was a moving force behind the acts described in Interrogatory No. 1, and that said custom existed because:

(a) the Chief or acting Chief of Police of the City of Pagedale exercised or failed to exercise the final authority to act on behalf of the defendant City of Pagedale in suspending, firing, or investigating its police officers? Answer: Yes (Yes or No)

(b) of the actions or inactions of the Mayor of the defendant City of Pagedale? Answer: No (Yes or No)

(c) of the collective or individual actions or inactions of the members of the Board of Alderpersons of the defendant City of Pagedale? Answer: Yes (Yes or No)

/s/ (illegible)
FOREPERSON

Dated this 28th day of May, 1986.

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-685

In The
Supreme Court of the United States
October Term, 1987

CITY OF PAGEDALE, MISSOURI,
Petitioner,

vs.

ELLENA HARRIS and MICHAEL HAYLES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Plaintiff Ellena Harris was falsely arrested, illegally detained, raped, sodomized and assaulted by Defendant Michael Hayles in a cemetery on January 29, 1985, while Defendant Hayles was employed by Petitioner City of Pagedale as a police officer and while Hayles was on duty in that capacity.

Plaintiff brought suit against Hayles and Pagedale pursuant to 42 U.S.C. § 1983. A jury trial was conducted on May 20-23, 27 and 28, 1986. Defendant Hayles appeared *pro se* and was absent for most of the proceedings.

The jury returned a verdict in favor of Plaintiff and against Defendant Hayles and the City of Pagedale for $200,000.00 on May 28, 1986. The Court entered judgment in favor of Plaintiff on the jury verdict on May 29, 1986. The Eighth Circuit unanimously affirmed the judgment on June 17, 1987.

REASONS FOR DENYING THE WRIT

The issue presented to the District Court and to the Eighth Circuit in this case was whether the defendant City of Pagedale was liable for the rape and sodomy inflicted upon Ellena Harris, Respondent herein, by Pagedale police officer Michael Hayles. The plaintiff's theory of liability was based on proof that there was, for a significant period of time prior to her attack in the graveyard, a custom within the City of Pagedale wherein policymaking officials in positions of authority failed to receive, investigate and act upon citizen complaints of police misconduct. Plaintiff asserted at trial that the City of Pagedale displayed deliber-

ate indifference to overwhelming evidence of police sexual and physical misconduct and that that custom was a moving force behind the rape and sodomy of Ellena Harris. Plaintiff contended, and both the District Court and Eighth Circuit agreed, that this custom violated 42 U.S.C. § 1983.

I

THE EIGHTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S HOLDING THAT THE PLAINTIFF HAD PROVED SHE WAS RAPED AND SODOMIZED AS A DIRECT AND PROXIMATE RESULT OF THE DELIBERATE INDIFFERENCE OF POLICYMAKING CITY OFFICIALS OF THE CITY OF PAGEDALE TO A PATTERN OF SEXUAL MISCONDUCT BY CITY POLICE OFFICERS, ESPECIALLY OFFICER MICHAEL HAYLES, THAT ON REPEATED OCCASIONS CITY OFFICIALS IN POSITIONS OF AUTHORITY AND RESPONSIBILITY WERE NOTIFIED OF THESE OFFENSIVE ACTS, BUT THAT UPON RECEIVING SUCH NOTICE, THESE CITY OFFICIALS REPEATEDLY FAILED TO TAKE ANY REMEDIAL ACTION AND THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW REQUIRING THE CONSIDERATION OF THIS COURT

The voluminous evidence of liability on the part of Petitioner Pagedale falls into three basic categories. The first category is the evidence of notice given to Pagedale policymakers prior to the rape, sodomy and assault of Plaintiff-Respondent Ellena Harris, concerning acts of misconduct committed by Pagedale police officers. These acts are limited to those involving physical and sexual assault or misconduct and false arrest. In most instances, several witnesses corroborate the same acts of police misconduct which were reported to Pagedale officials. In-

cluded in this category are both substantive proof of the truth of the allegations and proof of the notice communicated to Pagedale policymakers.

The second category of evidence is that which demonstrates the failure of Pagedale officials to properly respond to citizen complaints of such misconduct by police officers. This evidence refers to both misfeasance and malfeasance.

The third category delineates the authority and policymaking functions of the Mayor, the Board of Aldermen and the Chief of Police.

Category One: Evidence of Prior Police Misconduct and Notice to Pagedale Officials

Substantive Evidence

The assault, rape and sodomy committed by Detective Michael Hayles upon Ellena Harris is undisputed. Plaintiff's attorney read into evidence the indictment (T. 1/55), the guilty plea (T. 1/58) and the sentencing of Defendant Hayles (T. 1/69). As to substantive evidence of prior misconduct by Defendant Hayles, the plaintiff testified, without objection, that Hayles bragged to her, in the police station, that ". . . lots of women have been stopped and he have (sic) did it before," and that, ". . . all I had to do was cooperate with him and that I could go home." (T. 1/114). By "cooperate with him," Hayles said he meant, "That we couldn't go to a hotel because he was on duty, but he knew somewhere we could go." (T. 1/115). Plaintiff also testified, again without objection, that after the first rape and sodomy occurred in the cemetery, Hayles

said to her, ". . . I always come over here when I can't go to a hotel. He said I always come over here." (T. 2/29).

Arthurine Jones was a police officer for the City of Pagedale at the time of what has come to be known as the Prothro incident in the Summer of 1983. She testified she heard a woman crying down the hall and went to investigate. (T. 3/76). Officer Jones walked into the traffic office and found Hayles and Michelle Prothro in the room with the lights off. The girl was crying hysterically. (T. 3/77).

Officer Jones further testified that, after the Prothro incident, she had to clear some property out of Hayles' desk. In the desk, she found magazines portraying women tied up in various positions in the nude. (T. 3/91). Acting Chief Charles Johnson and Lt. Corbett were subsequently shown the magazines. (T. 3/99).

Even later, Alderman John Taylor, along with the then newly appointed Police Chief, Charles Johnson, and Lt. Corbett, were in the police department when the men had occasion to open Detective Hayles' briefcase. In it they found magazines containing pictures of nude women who were tied up. *Rope was also found in the briefcase.* (T. 3/144).

Witness Tina Forbes testified on behalf of the plaintiff that Hayles stopped her car in January, 1985 (T. 3/190) and found a small amount of marijuana in her car (T. 3/194). After taking Ms. Forbes to the Pagedale Police Department Forbes testified that Hayles asked her, "Will you give me some pussy if I let you go?" (T. 3/197).

Hayles then kissed Ms. Forbes on the lips without her consent. She agreed to have sex with Hayles because

she was afraid for her life. (T. 3/197). Hayles told Ms. Forbes that he would release her and that she should meet him that night at 11:30 p.m. in front of her home. (T. 3/198). Hayles also told her that if she told anyone about what he had done, he would come back and arrest her (T. 3/199). Hayles, indeed, came to her apartment building that night. (T. 3/201). She did not go outside to meet Hayles and the next night, while she was emptying her trash, Hayles caught her in her parking lot and forced her to agree to meet him at a nearby service station. (T. 3/201). Again, Ms. Forbes failed to meet Hayles and he called her home several times after that. (T. 3/202).

Substantive evidence was presented, during the course of the trial, of misconduct of Pagedale police officers other than Michael Hayles. While Leatrice Dowd was on the Board, prior to October, 1984, she testified, that three Pagedale police officers held the Board in City Hall, against their wishes, and told the Board they would not be released until the Board told the officers what pay raises they would get. (T. 6/151). They "manhandled" *Alderwoman Darlene Crawley.* (T. 6/152).

Mayor Mary Hall testified that Odis Williams was appointed Chief on June 10, 1982. (T. 6/166). On that night, Mayor Hall and Alderwoman Louise Hall were forcibly denied entrance to the Board meeting by police officers so that a new ordinance, which allowed Williams to be appointed chief, could be enacted without opposition. (T. 6/169-71).

On another occasion, Chief Williams falsely arrested Mayor Hall and said he was going to impeach her. (T. 6/206). Chief Williams was convicted on two counts of

perjury for testimony given regarding this arrest of Mayor Hall. (T. 3/40).

Notice Evidence

The Michelle Prothro Incident:

After describing the incident between Hayles and Michelle Prothro in June, 1983, Officer Tina Jones testified that she had told Chief Odis Williams exactly what she had observed when Williams questioned her about the matter. (T. 3/87).

Lt. Frederick Searcy had been with the St. Louis Metropolitan Police Department for thirty years at the time of the trial below. During the Summer of 1983, he was Watch Commander of the Seventh District. (T. 3/46). Lt. Searcy, currently staff aide to Congressman William L. Clay, testified as to the details of the so-called Prothro incident. Searcy, Michelle Prothro and Barbara Prothro, Michelle's mother, made a formal complaint against Hayles to Chief Odis Williams in Williams' office. (T. 3/59). Barbara Prothro told Chief Williams, in the presence of Lt. Searcy, that Hayles had had Michelle at the Pagedale police station and had threatened her. (T. 3/63). Hayles took Michelle to a small, dark room, threw a coat over her head and fondled her. (T. 3/64). Hayles put his hands in Michelle's pants. (T. 3/70).

Searcy heard Chief Williams say he was sick and tired of Hayles, that this was not the first time this had happened, that Williams had received previous complaints about Hayles and that Hayles was creating lots of problems. (T. 3/65).

St. Louis County Police Sex Crimes Unit Detective Alysia Johns testified that in June, 1983, she and her partner, Det. Lane Hollingsworth spoke with Chief Odis Williams pertaining to the Prothro investigation. (T. 4/60).

Louise Hall spoke with complainant Michelle Prothro and also believed Ms. Prothro's story about Hayles having sexually assaulted her. (T. 2/216). Although the Prothro complaint was not written, Alderwoman Hall considered it to be a formal complaint. (T. 3/32).

Alderwoman Louise Hall and Lt. Searcy told Mayor Hall about the Prothro complaint. (T. 6/182). Officer Alene Helms also told Mayor Hall about the incident. (T. 6/185). Mayor Hall personally spoke with Michelle Prothro about her assault (by telephone) and spoke with Michelle's mother concerning the complaint. (T. 6/186).

Alderwoman Hall admitted that she and Mayor Hall had called a Board meeting concerning the complaint that Hayles had assaulted Michelle Prothro in the Pagedale Police Department. (T. 2/202).

Alderman John Taylor admitted that Mayor Hall and Alderwoman Hall told him about the Prothro incident as having involved sexual misconduct by Hayles in June of 1984 [later Taylor corrected this date to June, 1983 (see T. 3/130)] in the front office of the Pagedale City Hall. (T. 3/115). The Prothro incident was also discussed at a personnel meeting of the Board of Aldermen. (T. 3/118).

City Attorney Jess Ullom testified he first learned of the Prothro incident when Mary Hall or Louise Hall brought up the complaint at a meeting. The women had

a letter to Barbara Prothro (Plaintiff's Exhibit 13) (T. 7/39). This was, in fact, the only way the Board ever learned that Williams had conducted an investigation. (T. 7/41).

Leatrice Dowd also admitted knowing about the Prothro incident. (T. 6/66).

The Tammy Owens Videotape:

Lt. Greenbaylum Walker of the Northwoods Police Department videotaped an interview of a female resident of the City of Pagedale named Tammy Owens in August or September of 1983. (T. 2/107). Lt. Walker telephoned the Mayor of the City of Pagedale, Mary Hall, within one or two days after the interview. (T. 2/109). Lt. Walker told Mayor Hall:

> I told her that I had viewed a video tape of a person that was in the custody of our department that had statements on it concerning a member of her police department that I felt that she should be apprised of *that could probably cause problems later if something wasn't done.* (T. 2/109). (emphasis added).

Lt. Walker told Mayor Hall that the officer in question was Michael Hayles. (T. 2/110).

Mayor Mary Hall and Alderwoman Louise Hall saw the videotape in late August or early September of 1983. (T. 2/110). Lt. Walker told Mayor Hall he thought this could cause trouble in the future. By that he meant:

> Either the person was not telling the truth and would continue to spread the rumor and that would be a problem I could foresee, or the person was telling

the truth and there could be the possibility of someone being assaulted. (T. 2/117).

Alderwoman Louise Hall testified that she had, indeed, seen the Owens videotape in August, 1983. (T. 2/186). She and Mayor Hall saw the tape; " . . . right after we had some questions about Michael Hayles in a previous thing that was being investigated." (T. 2/187).

Louise Hall described the allegations made by Tammy Owens against Michael Hayles in the videotape. She said Owens talked about how Hayles picked her up numerous times and he always made deals with her and took her to the park and to the Pagedale Industrial Court and to a hotel in Wellston. (T. 2/188). Hayles *tied Ms. Owens up and took nude photographs of her in the hotel.* Ms. Owens said Hayles threatened to book her if she refused to do as he told her. (T. 2/190). When Louise Hall viewed the tape, she believed the allegations made against Hayles (T. 2/193) and believed that he was a "sexual freak." (T. 3/41).

Alderwoman Hall discussed the tape with Mayor Hall (no relation to Alderwoman Hall). (T. 2/191). Louise Hall told Mary Hall, on the way home from viewing the videotape, that she thought this was something they needed to bring to the attention of the other Board members. (T. 2/199).

At a Board meeting, Mayor Hall told the Board about the Tammy Owens complaints concerning Michael Hayles. This was the videotape Mayor Hall was summoned to view by the Northwoods Police Department. (T. 6/176). She confirmed that she and Louise Hall had viewed the tape together. (T. 6/178).

According to Mayor Hall, Tammy Owens stated, on the videotape, that, among other things, Hayles tied Ms. Owens up and took her to the Pagedale Industrial Court. (T. 6/178). Mayor Hall believed the allegations made by Tammy Owens when she viewed the tape. (T. 6/179).

Mayor Hall told City Attorney Jess Ullom about the videotape and took the allegations made by Tammy Owens against Hayles to the Board of Aldermen. (T. 6/180). The tape was played for the jury and admitted into evidence.

Other Complaints Against Michael Hayles:

A Pagedale citizen, Maurice Lovejoy, wrote letters to all Board members complaining that Officer Michael Goodrich and Officer Michael Hayles were picking on him. (T. 2/211). Alderwoman Hall knew of other complaints which had been lodged against Hayles and other Pagedale police officers, as well, for assault.

Mayor Hall received a complaint by Tammy West, still another resident of Pagedale, through Louise Hall. Mrs. West had told Louise Hall that Hayles had arrested her, locked her up at City Hall, *tied her feet* and, "sexually approached her." (T. 6/173). Mayor Hall communicated this complaint to Alderman John Taylor and to City Attorney Jess Ullom. (T. 6/174). She then presented the complaint to the entire Board at a personnel meeting. (T. 6/175). She also told the Board about a number of complaints she had received about Hayles regarding sexual approaches. (T. 6/175).

Mayor Hall received another complaint about Hayles from Mary Ann Williams, a Pagedale resident and City employee. (T. 6/193). Mrs. Williams told the Mayor that

Hayles had locked her up in a cell and that she felt certain Hayles was watching her through the jail's closed circuit television camera so that Mrs. Williams was afraid to go to the bathroom. (T. 6/194). Mayor Hall reported this incident to the Board. (T. 6/195).

Robin Lee complained to Mayor Hall about Hayles. She told the Mayor that Hayles had arrested her and *tied her up with rope.* (T. 6/196). Mayor Hall believed Ms. Lee and reported the incident to City Attorney Jess Ullom and Alderwoman Louise Hall. (T. 6/197).

A portion of the deposition of Michael Hayles was read to the jury. Hayles said Chief Charles Johnson approached him on the street in January, 1985. Johnson said he had received a complaint from a mother that Hayles had come to her home and had tried to force the woman to allow Hayles to date her teenage daughter. (T. 6/43).

Mayor Mary Hall's Complaints Against Chief Odis Williams:

On November 16, 1982, Mayor Mary Hall sent a letter to the Board, (Plaintiff's Exhibit 12) stating that Chief Williams falsely arrested The Mayor and others on trumped up charges on June 12, 1982; that Williams held the Mayor and other citizens hostage for seven to eight hours on June 18, 1982 at a local Pagedale business establishment; and that during that time Williams fluorished his weapon and fired a shot. Mayor Hall also indicated that complaints had been filed against Chief Williams for rape and sodomy by Pagedale residents. These events (the rapes and sodomy) took place in a Pagedale vehicle. (T. 6/80).

Specifically, Annie Benjamin had complained to Mayor Hall that Chief Williams had forced her to commit oral sex upon him. (T. 6/200). Mayor Hall initially relayed the complaint to Jess Ullom and Louise Hall. These were the allegations that were also addressed by Mayor Hall in her letter to the Board of Aldermen. (T. 6/201).

In addition, Ms. Meggie George complained to Mayor Hall that Chief Williams had taken her to Heman Park in University City and forced her to commit other oral sex acts on himself and Clarence Wilson, another Pagedale employee. (T. 6/198). Chief Williams threatened Ms. George into submitting to these sex acts. Each of the forced sex acts took place in the Police Chief's car. (T. 6/199).

Mrs. Dowd admitted that all Board members received a letter from Mayor Mary Hall, dated November 16, 1982, accusing three Pagedale police officers—Ricky Collins, Michael Hayles and Odis Williams—of various acts of false arrest, sexual misconduct and physical assault. (T. 6/76).

Alderperson Dowd knew that the acts of rape and sodomy allegedly committed by Chief Williams took place at Heman Park in University City. (T. 6/90).

Complaints Against Pagedale Police Officer Ricky Collins:

In the November 16, 1982 letter of Mayor Hall to the Board of Aldermen, which demanded the firing of Chief of Police Odis Williams and police officers Ricky Collins and Michael Hayles, the Mayor wrote:

> Collins has terrorized Pagedale by all the different complaints that have been received ranging from brutality to rape to overreacting, and using unnecessary force. (T. 6/81).

Alderwoman Louise Hall had also known of another complaint lodged against Officer Ricky Collins regarding sexual misconduct. (T. 3/24). Mayor Hall had told Louise Hall she had received the complaint connecting Collins with a *statutory rape.* (T. 3/243). This was after June of 1983. (T. 3/26). Louise Hall believed the allegations in the complaint and admitted that Officer Collins, himself, told her he had thought the victim was older than she said she was. (T. 3/26).

Alderman Taylor testified that he, too, had received a complaint that Officer Ricky Collins had raped a fifteen year old girl (T. 3/126). Taylor received this complaint in May, 1983. (T. 3/134). Taylor communicated the complaint about Ricky Collins' alleged statutory rape to Chief Williams, who told the Alderman to shut up and mind his own business. Williams also threatened to have Taylor thrown off the Board of Aldermen. (T. 3/135). Taylor also told Louise Hall about this complaint. (T. 3/137).

Further, Dowd personally received another complaint of sexual misconduct regarding Ricky Collins. (T. 6/78).

She also read in the St. Louis Post-Dispatch that Ricky Collins had used unusual force in making an arrest. (T. 6/24). She received still another complaint that Collins and another officer had struck a man on 70th Street in Pagedale. (T. 6/126).

Other Complaints Regarding The Pagedale Police Department:

Prior to Plaintiff's rape, Alderperson Dowd had received reports that Pagedale officers had taken women into Laurel Hills Cemetery across the street from the Pagedale City Hall. (T. 6/131). This was the cemetery where Plaintiff was raped by Hayles. (T. 2/1 et seq.). Mrs. Dowd knew the officers were not supposed to be in the cemetery with women. She said, ". . . [t]hey weren't supposed to be patrolling the dead." (T. 6/133). She also remembers testifying in her deposition that the officers were on duty with women in the cemetery—"loafing." (T. 6/134).

Assistant United States Attorney David Rosen testified he had received official complaints about civil rights violations by Pagedale police. (T. 4/78). He wrote a letter to Chief Williams, dated August 23, 1982. (T. 4/79). The letter cited, ". . . an increasing number of complaints concerning [Pagedale] police officers." (T. 4/82).

John Taylor received other complaints concerning sexual misconduct by Pagedale police officers prior to the rape of Ellena Harris. (T. 3/137). He had received between 15 and 20 anonymous complaints while he was on the Board and referred them all to the Police Chief. When Taylor told the callers to contact the Chief of Police, they often told the Alderman that Chief Williams was also involved in the sexual misconduct. (T. 3/138). When Taylor attempted to follow up with the Chief to see if the callers had lodged their complaints, Odis Williams threatened the Alderman. (T. 3/139).

The late Mayor of Pagedale, Leatrice Dowd, accused Officer Moses King of brutalizing a pregnant woman, who then made a formal complaint regarding the incident. This was in 1980, when Mrs. Dowd was a member of the Board of Aldermen. (T. 6/62). Alderwomen Darline Crawley was the pregnant woman's landlady and Dowd and Crawley discussed the incident between themselves. (T. 6/64).

Category Two: Evidence of the Failure of Pagedale Officials to Properly Respond to Citizen Complaints

The Michelle Prothro Incident:

Chief Williams asked Lt. Searcy not to press the Prothro complaint because Williams was in hot water, had been having trouble in his job and had had trouble with Hayles before. (T. 3/61). Lt. Searcy read the letter which Chief Williams had written to Barbara Prothro to the jury. (T. 3/66).

St. Louis County Police Detective Alysia Johns could not get any cooperation from the City of Pagedale in the investigation of the Prothro incident. (T. 4/63). Det. Johns reported this to her superior, Major Moonier, and also told him she had run into a "stone wall" at Pagedale. (T. 4/64).

Alderwoman Louise Hall was unaware that any internal investigation of the Prothro incident had been made. Chief Odis Williams did not bring the matter to the attention of the Board of Alderpersons. Alderwoman Hall was not satisfied with the steps that were taken by the Pagedale administration in the handling of the matter because

she didn't think the investigation was carried out thoroughly. (T. 2/215).

In the letter to Barbara Prothro, Williams stated that he had interviewed Officer Tina Jones and Officer Alene Helms. It said that they had corroborated Hayles' version of the Prothro incident. However, Alene Helms denied doing so in trial. (T. 7/75). Tina Jones also contradicted Chief Williams' assertion. (T. 3/77).

City Attorney Jess Ullom did not have total confidence in the Williams investigation of Prothro. (T. 7/42).

According to Mr. Ullom, Mayor Hall was unaware that Hayles had been suspended over Prothro, as Chief Williams had informed the victim's mother. (T. 7/49). Although Chief Williams' letter to Barbara Prothro stated that Hayles had been suspended for two days, City Attorney Jess Ullom did not think Hayles was ever suspended at all. (T. 7/50).

According to Jess Ullom, neither of the two police officers who were present when Hayles allegedly assaulted Michelle Prothro (Tina Jones and Alene Helms) were called to testify before the Board. (T. 7/43). In contradiction to this testimony, Leatrice Dowd testified that when she was on the Board, both Jones and Helms appeared before the Board and corroborated Chief Williams' version of the Prothro investigation. (T. 6/86).

Leatrice Dowd, then a member of the Board of Aldermen and late Mayor of Pagedale, was not satisfied with Chief Williams' investigation of the Prothro incident. (T. 6/68). Dowd testified that Mayor Hall had recommended to the Board that Hayles be fired over the Prothro mat-

ter. (T. 6/71). Hayles was not fired or disciplined by the Board. (T. 6/71).

Alderman John Taylor, Louise Hall and Mayor Mary Hall felt the Prothro matter was being covered up. (T. 3/141). Louise Hall told Taylor she suspected a cover-up. (T. 3/142).

Detective Alysia Johns testified that in cases where the St. Louis County Police can obtain no cooperation from victims or, in this case, the Pagedale Police Department, the complaint is, in conformance with departmental practice, labelled as "unfounded." In fact, in her investigation, Det. Johns had not even been able to speak with Pagedale Police Officers Michael Hayles, Tina Jones or Alene Helms regarding their personal knowledge of the Prothro incident. (T. 4/63).

The Tammy Owens Videotape:

Although the Prothro investigation by St. Louis County Police was pending when Louise Hall and Mary Hall viewed the Tammy Owens videotape, they made no effort to inform the County police about the allegations made by Tammy Owens. (T. 3/22). Louise Hall testified she did not go back and tell any Board member about the tape. In fact, Louise Hall testified that the Owens videotape was never discussed with any other Pagedale Board members. (T. 2/191). Louise Hall and Mary Hall said there was no point in telling the Board because the Board members would not believe them. Louise Hall did not report the Owens allegations to any member of the Pagedale Police Department. (T. 2/192). She took no official action. (T. 2/194).

In contradiction to the testimony of Alderwoman Louise Hall, then Mayor Mary Hall stated that she brought the Tammy Owens videotape to the attention of the Board. The Board voted 4-2 against firing Hayles. (T. 6/181). There was no evidence that the Board conducted any investigation into the allegations made on the Owens videotape or that it requested its Chief of Police or any other law enforcement agency to do so.

Other Complaints Against Michael Hayles:

When Chief Charles Johnson confronted Hayles with the complaint of sexual misconduct in January, 1985, Hayles testified (in deposition) that Johnson took no official action regarding the matter. (T. 6/45).

Neither John Taylor, Louise Hall nor Leatrice Dowd admitted receiving notice of the complaints of Tammy West, Mary Ann Williams and Robin Lee. (T. 2/186-2/205; 3/2-3/43; 3/110-3/173; 6/48-6/162).

Mayor Mary Hall's Complaints Against Chief Otis Williams:

No member of the Board communicated with the Mayor regarding her accusations against Chief Williams. No action was taken on the accusations. (T. 6/202).

Complaints Against Pagedale Police Officer Ricky Collins:

No member of the Board communicated with the Mayor regarding her written accusations against Ricky Collins. No action was taken on the complaint. (T. 6/202).

Although Alderwoman Louise Hall believed that Ricky Collins was guilty of statutory rape, she did not bring the

matter to the attention of the Board of Aldermen. (T. 3/27).

When Alderman Taylor communicated the complaint regarding Ricky Collins to Chief Williams, the Chief of Police told Alderman Taylor to shut up and mind his own business. (T. 3/135).

Other Complaints Regarding The Pagedale Police Department:

When Alderman John Taylor followed up on the 15 to 20 citizen complaints that were directed to Chief Williams, the Chief of Police told Alderman Taylor to shut up and threatened to throw him off the Board. (T. 3/139).

Mayor Dowd, then an Alderwoman, voted to keep Odis Williams on as Chief of Police even after he had been convicted of two counts of perjury. (T. 6/94). She would have kept him as Chief and the Board removed him only reluctantly. (T. 6/155-156).

Category Three: The Authority of the Mayor, The Board of Aldermen and the Chief of Police

The Mayor

Louise Hall testified the Mayor had the authority and responsibility to take action once investigations of citizen complaints are complete. (T. 3/4). Before January 29, 1985, the Mayor, among others, had the authority to receive citizen complaints regarding police misconduct, sexual misconduct, physical abuse and false arrest. (T. 6/53).

Jess Ullom testified that the Mayor, under statute and ordinance, had the authority to investigate citizen

complaints. (T. 7/55). The Mayor can also suspend city employees, including police officers, and has the authority to supervise the entire executive branch, by state law, and, under statute, to see to it that all the laws are vigorously supported. (T. 7/56).

The Board of Alderpersons

Alderwoman Louise Hall testified that the Board had the authority to take action after investigations on citizen complaints were conducted. (T. 3/4). According to Leatrice Dowd, the Board had the responsibility and authority to receive citizen complaints. (T. 6/53).

The Chief of Police

The Chief had the duty and responsibility to investigate citizen complaints, according to Louise Hall. (T. 3/4). He could suspend police officers until the next Board meeting. (T. 3/5).

John Taylor testified that the Chief:

—Had the authority to fire police officers until June, 1983. (T. 3/120);

—Lost the authority because Chief Williams constantly brought disciplinary actions against white officers. (T. 3/120);

—Suspended officers 10-15 times while Taylor was on the Board. (T. 3/122);

—Suspended Officer Michael Goodrich for police brutality (T. 3/124) on more than one occasion. (T. 3/125);

—Suspended Officer Meadows on more than one occasion. (T. 3/126);

—Suspended Officer Corbett on more than one occasion. (T. 3/127).

Mayor Dowd testified that the Chief:

—Had authority to discipline officers (T. 6/52);

—Had authority to receive citizen complaints. (T. 6/53);

—Was usually asked to investigate such complaints. (T. 6/53);

—Had authority to reassign officers to other shifts without Board approval. (T. 6/57);

—Had training authority. (T. 6/57).

Mayor Dowd admitted that, in her deposition, she had testified that Chief Williams usually hired police officers. (T. 6/73). Also in her deposition, Dowd testified that Former Chief Merle Guyot had authority to suspend officers. (T. 6/159). Chief Williams could suspend officers, "... for a little while." (T. 6/152).

Mayor Hall testified that when she was first elected to the Board, Chief Williams made policy concerning police procedures. (T. 6/203).

City Attorney Ullom testified that the Chief:

—Could suspend officers. (T. 7/35);

—Can always investigate whatever he wants. (T. 7/38);

—Displayed, by writing the letter to Barbara Prothro, "... an example where the Chief, without asking anybody's approval, initiated solely on his own a two-day suspension against a police officer." (T. 7/52);

—Had authority to suspend officers under Pagedale ordinance. (T. 7/53);

—Had duty and authority to investigate wrongdoing concerning his personnel. (T. 7/54);

—Had inherent authority to supervise the police department and to set internal policy within the police department. (T. 7/54);

—Had suspended Officers Goodrich and Meadows on his own authority. (T. 7/55).

Clearly, the amount of substantive evidence of prior misdeeds of Pagedale police officers and of the deliberate indifference of Pagedale officials satisfies even the most stringent standard of proof imaginable. Petitioner continues to state without equivocation its aggravating argument that ". . . not one whit of evidence" was adduced at trial to support Respondent's verdict and affirmance. Such spurious assertions can only make one wonder if counsel for Petitioner City was awake during trial.

Indeed, the case of Ellena Harris portrays a chilling story of petty politicians concerned more about their own personal aspirations and animosities than in their public responsibility of protecting the unfortunate women of Pagedale who repeatedly complained of the sexual molestation being committed by the municipality's police officers. A continuing failure of policymakers to remedy a known pattern of police brutality is sufficient to incur supervisory and municipal liability under 42 U.S.C. § 1983. *Herrera v. Valentine*, 653 F.2d 1220, 1225 (8th Cir. 1981); *Depew v. City of St. Mary's, Georgia*, 787 F.2d 1496, 1499 (11th Cir. 1986); *Black v. Stephens*, 662 F.2d 181, 191 (3d Cir. 1981), cert. denied 455 U.S. 1008 (1982); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 326-332 (2d Cir. 1986).

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981), was a case very similar to the present one. In *Herrera,* a woman beaten by a police officer filed a Section 1983 action against the officer and the city by which he was employed. The jury returned a verdict against both the police officer and the municipality. On appeal, the city claimed that the plaintiff had not adduced the evidence to support a finding of a municipal custom or policy.

The Eighth Circuit rejected that argument, noting that plaintiff had proven numerous citizen complaints protesting the misconduct of the city's police department, had shown that formal complaints were lodged by the Nebraska Indian Commission and County Attorney's Office with the city and that a report had been prepared by an outside consulting firm criticizing the city and its operation of the police department. 653 F.2d at 1225. Despite these complaints pertaining to prior acts of police brutality, the city took no steps to remedy or correct the problem. This inaction in the face of numerous complaints of police brutality was sufficient to sustain municipal liability under 42 U.S.C. § 1983, Id.

Using similar reasoning, the Third Circuit Court of Appeals held that the acquiescence of a chief of police to the use of excessive physical force by his subordinate police officers would support a finding of municipal liability. *Black v. Stephens,* 622 F.2d at 191.

Finally, in another police brutality case, the Eleventh Circuit wrote:

> The complaint states that the City of Cooper City has a custom of allowing the use of excessive [police] force. If established, this allegation provides the

> requisite fault on the part of the City, as a persistent failure to take disciplinary action against police officers can give rise to the inference that a municipality has ratified conduct, thereby establishing a "custom" within the meaning of Monell.

Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985).

The standard announced in *Herrera, Black,* and *Fundiller* has been overwhelmingly met in this case.

The cases of *Baker v. McCoy,* 739 F.2d 381 (8th Cir. 1984); *Patzner v. Burkett,* 779 F.2d 1363 (8th Cir. 1985); *Strauss v. City of Chicago,* 760 F.2d 765 (7th Cir. 1985) and *Gilmere v. City of Atlanta,* 737 F.2d 894 (11th Cir. 1984) are distinguishable on their facts.

In *Baker,* the Eighth Circuit ruled that municipal liability was not shown because there was no evidence of a "pattern of similar incidents" of unconstitutional conduct. 739 F.2d at 385. Similarly, in *Patzner,* the plaintiff alleged that the defendant police officer had been involved in six prior arrests, involving physical confrontation. However, the plaintiff failed to allege that the use of physical force was improper or that the previous arrestees had complained about the arrests. 779 F.2d at 1367. *Strauss* involved the use of statistical evidence to show that a number of citizen complaints had been received regarding the municipality's police force. There was no proof, however, as to the specific nature of the complaints nor that the complaints were not thoroughly investigated and acted upon. 760 F.2d at 767. Finally, in *Gilmere v. City of Atlanta,* 737 F.2d 894 (11th Cir. 1984), the Eleventh Circuit found that municipal policymakers had not been put on notice of the existence of excessive police force. 737 F.2d at 902.

The cases cited above differ from the instant matter in that, in those cases, the plaintiffs simply did not prove or allege the factual elements of a Section 1983 cause of action. By contrast, in the present case, the plaintiff has. There can be no doubt that Ellena Harris proved a number of incidents of citizen complaints of police brutality. In addition, Respondent adduced specific details of these incidents, including the identities of the victims and perpetrators, and the nature of the brutality. Harris also established that the prior citizen complaints were received by, or brought to the attention of, Pagedale policymakers who failed to adequately investigate or pursue the matters. For these reasons, the decisions relied upon by Pagedale are irrelevant to this case.

Furthermore, Pagedale's commentary on negligence and 42 U.S.C. § 1983 is quite inapposite to this appeal. The recent decisions of *Daniels v. Williams,* 474 U.S. —, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon,* 474 U.S. —, 88 L.Ed.2d 677 (1986) relied upon by Pagedale, merely confirmed the proposition that negligent conduct can not amount to a violation of due process. Although *Davidson* and *Daniels* are obviously significant cases in the civil rights field, in general, they really have no impact on the merits of this case inasmuch as the courts have uniformly ruled for a number of years that something more than negligence must be proven to state a due process violation. See, e.g., *Hollins v. Powell,* 773 F.2d 191 (8th Cir. 1985); *Herrera v. Valentine,* 653 F.2d 1220 (8th Cir. 1981). Thus, in conformance with these rulings, Harris has alleged and proved intentional acts and conduct undertaken with deliberate indifference to the violation of her constitutional rights. Instruction number 9, which

was read to the jury, clearly defines a municipal custom as, inter alia, a "course of conduct of *deliberate indifference . . .*" (emphasis added). Nothing in the instructions given to the jury would have allowed the rendering of a verdict on the basis of common law negligence.

"*Although not necessarily adopted by a person or body with rulemaking authority,* customs can become so settled and permanent as to have the force of law." (emphasis added) *Monell v. Dept. of Social Services,* 436 U.S. at 690-91. Obviously, this describes the Pagedale situation perfectly.

Finally, the record clearly supports the jury's finding of deliberate indifference on the part of Pagedale policymakers. As defined by the Eighth Circuit, deliberate indifference may be proved by showing: 1) notice of a pervasive risk of personal harm; and, 2) a failure to reasonably respond to such a risk of harm. *Porm v. White,* 762 F.2d 635 (8th Cir. 1985); *Martin v. White,* 742 F.2d 469, 475 (8th Cir. 1984); *Wade v. Haynes,* 663 F.2d 778, 781 (8th Cir. 1981), aff'd sub nom *Smith v. Wade,* 461 U.S. 30 (1982); *Goodman v. Parwatikar,* 570 F.2d 801 (8th Cir. 1978).

Respondent has previously reviewed the notice that Pagedale officials received regarding the police harassment and brutality that was occurring within its police department and also extensively described the failure of the City to reasonably respond to the risk presented to its citizenry (i.e., failure to receive, investigate and act upon citizen complaints of police brutality). Substantial evidence exists in the record to support a finding of deliberate indifference.

II

THE EIGHTH CIRCUIT, IN HARRIS VS. PAGEDALE, IS UTTERLY CONSISTENT WITH HOLDINGS IN OTHER CIRCUITS, INCLUDING THE D.C. CIRCUIT'S OPINION IN CARTER VS. DISTRICT OF COLUMBIA

Respondent asserts that the holding in *Carter v. District of Columbia,* 795 F.2d 116 (D.C. Cir. 1986), relied upon by Petitioner in its Petition, is not in conflict with the holding of the Eighth Circuit United States Court of Appeals in the case at hand, nor is it at conflict with any other holding of any Circuit in the United States, as erroneously alleged by Petitioner. The *Carter* Court correctly stated the governing law, as contained in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978).

The *Carter* Court correctly noted that the standard of proof for a Section 1983 Plaintiff is that he or she must show a ". . . persistent, pervasive practice, attributable to a course deliberately pursued by official policymakers, one that caused the deprivation of constitutional rights Plaintiff experienced." (At Page 125). The *Carter* Court recognized that a Plaintiff may establish a sufficient case under Section 1983 by showing a Defendant's official policy or custom to condone unlawful acts through deliberate indifference to complaints. (See, Footnote 8, at Page 125). Unquestionably, the legal standard applied in *Carter* was the same standard applied in the case at hand. Therefore, Petitioner's allegation that there is a conflict between the Circuits is totally without justification and must be rejected.

Respondent recognizes that there are factual differences between the circumstances faced by the Court in

Carter, as opposed to the facts and circumstances presented to the Court in the instant case. In particular, the *Carter* Court noted, in that case, that the ". . . over-arching question," was whether or not the individual Defendants had, in fact, committed the wrongs alleged by Plaintiffs. (At Page 132). This is the opposite of the instant case, in which the City of Pagedale admitted the misconduct of Officer Hayles towards Respondent, and Officer Hayles had, prior to the trial in the instant case, entered a plea of guilty to the sexual assault against Harris.

Another factual difference between the two cases is that the District Court in *Carter* failed to properly limit the use of evidence of other misconduct. In the instant case, the Eighth Circuit noted that the District Court had meticulously instructed the jury as to the proper use of evidence of other misconduct. The *Carter* Court, in recognizing that a Section 1983 Plaintiff must show that the municipality was ". . . both on notice of and indifferent to wide-spread police brutality . . ." (at page 132), only held that the District Court committed reversible error by failing to instruct the jury as to the use of evidence of other misconduct. The Court emphasized, however, that this type of evidence against the City " . . . would have been in order if the District Court had properly circumscribed and controlled such evidence to protect against jury misuse." This is, put simply, the opposite of the facts and circumstances of the instant case.

Far from conflicting with the holding of the Eighth Circuit in the instant case, the *Carter* holding bolsters the Eighth Circuit's holding in the instant case. The *Carter*

Court recognized that one of the factual circumstances which may give rise to municipal liability in a Section 1983 case occurs where the municipality engages in a " . . . deliberate 'see no evil' policy." (At Page 124). The *Carter* Court noted that the Plaintiff in that case had failed to show a deliberate policy by policy making officials in the District of Columbia. In the instant case, Respondent Harris presented a specific, detailed factual showing of deliberate indifference by policymaking officials in the City of Pagedale to the allegations and complaints of sexual misconduct by its police force, including the Police Chief (who personally "stonewalled" at least one investigation by an outside agency). Should this Court follow Petitioner's absurd logic, a City, like the Respondent City of Pagedale, would be able to escape civil liability for gross violations of citizens' civil rights, even though every individual in a policymaking position in that municipality had knowledge of the facts and circumstances, by merely claiming that because the individuals failed to act collectively as a unit, they could not be held to be responsible for a deliberate policy. Nothing in the *Carter* case suggests this outrageous precedent.

CONCLUSION

For the foregoing reasons, this case does not present any questions of general importance which should be considered by this Court, nor does the Eighth Circuit opinion in *Harris vs. Pagedale* conflict with holdings

among other circuits, and the Petition for a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

Respectfully submitted,

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